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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

4 Plaintiff,

5 v.

12 CV 1422 (JSR)

6 BANK OF AMERICA CORPORATION,
7 *successor to Countrywide*
8 *Financial Corporation,*
9 *Countrywide Home Loans, Inc.,*
10 *and Full Spectrum Lending, et*
11 *al.,*

Defendants.

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12 New York, N.Y.
13 September 24, 2013
10:00 a.m.

14 Before:

15 HON. JED S. RAKOFF,

16 District Judge

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PREET BHARARA

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Southern District of New York

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(In open court)

THE DEPUTY CLERK: United States v. Bank of America, 12 CV 1422. Will everyone please be seated and will the parties please identify themselves for the record.

MR. ARMAND: Pierre Armand for the government. With me I have Assistant United States Attorneys Jaimie Nawaday, Joe Cordaro, Carina Schoenberger, and Ellen London.

THE COURT: Who is the other individual?

MR. ARMAND: Also two paralegals at the table with me. Rebecca Michaud and Victor Lam who is here.

MR. SULLIVAN: Good morning, your Honor. Brendan Sullivan for Bank of America. On the joint team defending the corporate banks, that includes the Bank of America Countrywide Home Loans and Countrywide Bank, I'll be do the opening for all the institutions. Those present this morning including myself are Enu Mainigi, Malachi Jones, Ken Smurzynski, Craig Singer, Steve Cady, Katie Hayes, Jennifer Wimsatt, Allison Jones, Rich Strassberg, Bill Harrington. We have a technical genius with us this morning, Alex Rennick to assist us with all the equipment.

THE COURT: Good morning. My experience has been that whenever there is a technical genius, there is a glitch, but hopefully that won't happen.

All right. Yes, sir.

MR. MUKASEY: Hi, Judge.

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1 THE COURT: I'm sorry. There are other lawyers here.
2 Thank you.

3 MR. MUKASEY: Marc Mukasey with Michael Hefter, Seth
4 Cohen, Ryan Philip, and our client Rebecca Mairone.

5 THE COURT: Good morning.

6 I'm sorry we were delayed earlier, but let's get right
7 to the motions in limine. Incidentally, this probably goes
8 without saying, but all witnesses except for one party
9 representative and the individual defendant are hereby excluded
10 from the courtroom. So if there are any witnesses present,
11 they need be excluded now. That goes throughout the trial.

12 Start with the government's motion, let me also say
13 with respect to all my rulings on the motions in limine, they
14 are of course subject to being reconsidered under extraordinary
15 circumstances, the most likely of which would be if someone
16 opened a door that had otherwise been shut. So, for example,
17 if I were to exclude any reference to someone's compensation,
18 for example, and then that witness gets on the stand and in a
19 very unlikely scenario says, you know, I'm just a poor, simple
20 barefoot investment banker, that would open the door to
21 compensation. So, I give that absurd hypothetical just to
22 point out that my rulings are subject to reconsideration, but
23 only under extraordinary circumstances.

24 Government's first motion is to preclude defendants
25 from presenting evidence or argument that non-Hustle loans

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1 outperformed Hustle loans with respect to delinquency defect
2 rate. Outperformed in the sense of being worse, so to speak.
3 That motion is granted.

4 The second government motion is to exclude evidence
5 regarding the government's knowledge or participation in
6 settlement discussions between the bank defendants and Fannie
7 Mae. That motion is granted.

8 The third motion is the motion to exclude evidence
9 concerning the bank defendants' employees' character for
10 truthfulness and honesty. That motion is granted, unless of
11 course, as the government recognizes, the door is opened by an
12 attack on a given witness's credibility, in which case
13 character evidence which may otherwise be inappropriate will be
14 admitted.

15 The fourth government motion is the motion to exclude
16 opinion testimony by lay witnesses which the government
17 characterizes as legal conclusions. Some of it is also about
18 their perception that certain practices were not fraudulent or
19 the like. That motion is granted.

20 The fifth motion is the motion to exclude evidence
21 concerning indemnification agreements with Bank of America.
22 That motion is granted.

23 The sixth motion is the motion to exclude evidence
24 regarding allegations or legal theories that the government
25 once alleged but is no longer pursuing. That motion is

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1 granted.

2 The seventh motion is the motion to exclude opinions
3 of counsel about what the motivations of the government was in
4 bringing this case or the like. That motion is granted.

5 The eighth motion is the motion to exclude the
6 proposed testimony of certain 30(b)(6) witnesses at trial. To
7 the extent that the defense believes it can call a 30(b)(6)
8 witness to testify as a witness about what the company's
9 position is or something like that, that motion is granted.
10 That will not be permitted.

11 The ninth motion is the motion to exclude videotaped
12 deposition clips during opening statements or closing
13 arguments. That motion is denied.

14 The final government motion is a motion to exclude the
15 proposed expert opinions of Mr. Grice. G-R-I-C-E. With
16 respect to all the experts who have been challenged, I'm going
17 to want to have, before they testify in each case a short
18 Daubert hearing, typically at least 24 hours before they
19 testify. Because at least from the motion papers, I don't
20 think I can make across-the-board rulings on any of the
21 experts, though that may change after the hearing. So that
22 motion is reserved.

23 With respect to the banks' motions, the motion to
24 exclude Cindy Simantel's e-mail, I'm going to reserve on that
25 motion. I think we'll have to see how it comes up and we'll

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1 deal with it if and when it's offered. But I will preclude the
2 government from making any reference on opening statement to
3 that e-mail.

4 With respect to the motion to exclude evidence
5 concerning Full Spectrum Lending's quality assurance process,
6 that motion is denied.

7 With respect to the motion to exclude evidence and
8 argument concerning the conservatorship of Fannie Mae and
9 Freddie Mac, that motion is granted.

10 With respect to the motion to exclude evidence and
11 argument that Bank of America itself engaged in the fraudulent
12 scheme as opposed to Countrywide, that motion is granted.

13 With respect to the motion to exclude evidence or
14 argument regarding alleged wrongdoing in the loan repurchase
15 process, that motion is granted.

16 With respect to the motion to exclude evidence and
17 arguments that a FIRREA affect is shown by any risk of loss as
18 opposed to new or increased risk of loss, I'm not sure I
19 understand that motion. So we'll come back in a minute, that's
20 the one I think I want to hear oral argument on.

21 With respect to the motion to exclude evidence that
22 Hustle processes impacted the quality of Countrywide's
23 non-Hustle loans, that motion is granted.

24 With respect to the motion to exclude hypothetical
25 questions to lay witnesses, it of course turns on the question

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1 and the reason the question is put. But, hypothetical
2 questions to establish, for example, materiality, would be
3 permitted. So, the motion is denied as a general matter, but
4 there may still be objections to particular questions that the
5 Court will deal with on an item-by-item basis.

6 With respect to the motion to exclude evidence and
7 argument blaming defendants for the global economic issues and
8 public harms, that motion is granted.

9 With respect to the motion to exclude argument and
10 evidence about fraud and subprime lending, that motion is
11 granted.

12 With respect to the motion to exclude evidence
13 regarding Countrywide field branches, as a general matter that
14 motion is granted. But there may be, and we'll have to deal on
15 an item-by-item basis, there may be some particularized showing
16 that the government may can make at any given situation. That
17 may be an exception to that general ruling.

18 With respect to the motion to exclude reference to the
19 bank defendants' payment of an employee's attorneys' fees, that
20 motion is denied.

21 With respect to the motion to exclude certain e-mails
22 by Patrick Aliano and related evidence, that motion is granted.

23 With respect to the motion to exclude evidence of
24 employees' compensation or wealth, that motion is granted.

25 With respect to the motion to exclude evidence that

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1 central fulfillment was the expanded form of Hustle, that
2 motion is denied.

3 With respect to the motion to exclude the opinions and
4 testimony of Dr. Mason, again we'll have a Daubert hearing.
5 However, since the question of penalty is for the Court, not
6 the jury, I'm not sure why he would be testifying until after
7 the jury verdict is in. But we can discuss that.

8 With respect to the motion to exclude the expert
9 testimony of Charles Cowen, we will have a brief Daubert
10 hearing, but I should flag that I think it's likely that some
11 of his testimony at least will be admitted.

12 With respect to the motion to exclude the expert
13 testimony by Ira Holt, again, we'll have a brief Daubert
14 hearing, but I think it is likely his testimony will in part or
15 whole be admitted.

16 With respect to the motion to partially exclude the
17 expert testimony of Daniel McFadden, that motion is now moot as
18 I understand it.

19 With respect to the motions from Ms. Mairone, her
20 first motion is the motion to exclude evidence of compensation
21 or net worth. That motion is granted.

22 Her second motion is the motion to exclude evidence
23 that central fulfillment was the same as Hustle or an expanded
24 form of Hustle. That motion is denied.

25 Now, that finishes all the motions except for the one

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1 that I want oral argument on. This is the defendant's motion
2 to exclude evidence and argument that a FIRREA affect is shown
3 by any risk of loss as opposed to any new or increased risk of
4 loss. I did not understand this motion.

5 MS. MAINIGI: Allison Jones from our office will be
6 doing the argument for us.

7 MS. JONES: Good morning, your Honor. Allison Jones
8 for Bank of America.

9 So the government has argued that it can show an
10 affect on a federally insured financial institution by showing
11 a new or increased risk of loss.

12 THE COURT: The two institutions -- by the way, I
13 don't know if the government is even still pursuing its sort of
14 indirect affect argument. They're shaking their head no. But
15 in any event, in my summary judgment opinion which I still owe
16 you but which I promise you I'll give you the bottom line in
17 this respect, I'm going to deny that prong of the government's
18 approach.

19 So it comes down to the two institutions being
20 affected are Countrywide and Bank of America. As it has now
21 played out, since we're only concerned with the fraud
22 perpetrated allegedly by Countrywide, the impact on Bank of
23 America was really not the self-affecting. It is really a
24 direct impact. They merged with Countrywide and therefore
25 assumed the risk that had been increased or whatever by

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1 Countrywide.

2 So, to some extent this whole big debate about
3 self-inflicting or not seems to me to have been largely
4 dissipated by the way this case has now played out.

5 But with respect to Countrywide, the impact or the
6 affect was because they took actions to defraud, allegedly,
7 Fannie Mae and Freddie Mac. So I don't understand what your
8 argument is.

9 MS. JONES: To be clear, your Honor, this argument is
10 not tied to the self-affect arguments that we've made before.
11 So, the government is claiming that an affect can be a mere
12 risk of loss. Not an actual loss, just a risk. So, their
13 argument previously has been that because Countrywide sold
14 loans to Fannie and Freddie, that created a risk of repurchase,
15 that, therefore, Countrywide exposed itself and possibly Bank
16 of America to a risk of loss, because there was this risk that
17 Fannie Mae and Freddie Mac would ask the loans be repurchased.
18 Now that --

19 THE COURT: That's not the approach I took in the
20 motion to dismiss. So, I'm still missing the point.

21 MS. JONES: Our argument here, your Honor, is just
22 that the government should not be allowed to argue to the jury
23 the incorrect legal theory that the fact of making a loan makes
24 a risk that is an affect on a financial institution, because
25 Countrywide was in the business of making loans and selling

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1 them to Fannie and Freddie, and every loan they made created
2 this risk.

3 THE COURT: Let me just see, because, as I say, I
4 think because of the way in the second amended complaint this
5 has now played out, assuming, as I must for this purpose, that
6 the government is able to show that Countrywide lied to Fannie
7 Mae and Freddie Mac and thereby induced them to purchase loans
8 that they otherwise would not have purchased.

9 When Bank of America, a federally insured bank, then
10 acquired Countrywide, they were impacted, were they not, by
11 that fraud, by any liabilities that could arise from that
12 fraud? Civil, criminal, or whatever.

13 MS. JONES: So you're correct, your Honor, but the
14 comparison here is between the fraud --

15 THE COURT: I don't understand what the issue is.
16 What issue is left for the jury?

17 MS. JONES: The question is the affect on BofA from
18 the fraud versus the affect from non-fraudulent loans. So when
19 they took over Countrywide's business, they took on loans that
20 the government claims were affected by fraud, and loans that
21 the government claims weren't affected by fraud. So this risk
22 of repurchase from non-fraudulent loans and this risk of
23 repurchase from allegedly fraudulent loans.

24 So the government has to show under the case law,
25 numerous circuits, that the risk that Bank of America was

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1 exposed to was a new or increased risk. That it wasn't the
2 same risk that was carried by the non-fraudulent activities of
3 Countrywide. So the government has to show that comparing the
4 fraud --

5 THE COURT: When Bank of America acquired Countrywide,
6 there was no disclosure to Bank of America, was there, that
7 Countrywide had committed violations of federal criminal
8 statutes under the government's hypothesis?

9 MS. JONES: Well, your Honor --

10 THE COURT: So how can you say that they weren't
11 affected?

12 MS. JONES: There are two federally insured financial
13 institutions at issue here. Not only Bank of America N.A., but
14 also Countrywide Bank.

15 THE COURT: I'll get back to Countrywide in a minute.
16 But I'm just focusing for the moment. This was not the way it
17 was presented in the original complaint. The original
18 complaint, the allegation was that Bank of America was itself
19 engaged in fraud. That has now been eliminated by the second
20 amended complaint and the various motion practice in prior
21 proceedings.

22 So, under the present setup, it seems to me, that at
23 least as to Bank of America, it clearly was affected,
24 undisputedly.

25 What is the claim to the contrary?

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1 MS. JONES: I don't believe the government has asked
2 you to rule as a matter of law on whether Bank of America N.A.
3 was affected. The law of this circuit clearly says that is an
4 issue for the jury. Our motion here --

5 THE COURT: In any civil case, if there is no genuine
6 dispute about an issue, then it is no longer an issue for the
7 jury.

8 MS. JONES: To be clear, Bank of America disputes they
9 were affected by the fraud, your Honor.

10 THE COURT: Pardon?

11 MS. JONES: Bank of America disputes that they were
12 affected by the fraud.

13 THE COURT: The words are "genuine disputes," so now I
14 know you dispute it, what is the basis for that?

15 MS. JONES: The indemnification agreements actually
16 prevent Bank of America N.A. from being affected by the fraud.

17 THE COURT: I don't understand how that can be. Of
18 course, if that is what you want to present to the jury, then
19 of course, which I have excluded, then of course the other side
20 of that will be they get to put in their business about how
21 Bank of America refused to repurchase and blah, blah, blah, we
22 go down that route. I've thrown that out on the present
23 status.

24 But that's not the point. My question to you was, if
25 unknowingly a bank merges with a company that has criminal

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1 liability, how is it not affected?

2 MS. JONES: I believe it would be --

3 THE COURT: The indemnification wouldn't mean beans,
4 for example, with respect to criminal penalties that would be
5 imposed.

6 MS. JONES: It does, your Honor. The indemnification
7 agreement as Mr. Wertz testified in his deposition just last
8 week, covers penalties, fines, settlements, attorneys' fees.

9 THE COURT: I don't see how that can be a legal
10 agreement. That you would pay someone else's criminal fines?

11 MS. JONES: I don't know about criminal fines. This
12 certainly isn't a criminal case so he was testifying --

13 THE COURT: The heart of this FIRREA is in effect, so
14 far as the provisions relevant to this case are concerned, is
15 that civil liability for criminal acts.

16 MS. JONES: Yes, your Honor.

17 THE COURT: Therefore, by definition there would be a
18 potential criminal liability, and I think it is well-settled
19 law that no one can indemnify another person or another entity
20 for criminal penalties.

21 MS. JONES: But if we're talking about actual affects
22 in this case, not hypothetical affects that possibly could
23 occur in another case.

24 THE COURT: But it is the risk. We're never concerned
25 these situations with anything but the risk. The increased

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1 risk as you said.

2 MS. JONES: Right. I'm struggling to understand the
3 point here, your Honor. Our motion is much more limited, just
4 to make sure that the government is only allowed to argue to
5 the jury that an increased risk or a new risk could satisfy
6 this affect prong. Your Honor is saying that Bank of America
7 was exposed to a new risk. That's an argument that the
8 government certainly will be allowed to make. The argument
9 they're not allowed to make is because --

10 THE COURT: I am questioning whether there is any
11 genuine dispute about that. But go ahead, I interrupted you.
12 Go ahead.

13 MS. JONES: I was going to say for purposes of this
14 motion, your Honor, the government is not allowed to argue to
15 the jury that because Countrywide issued creative loans and
16 sold them to Fannie Mae and Freddie Mac, and those loans
17 created a risk of default or repurchase, just like any other
18 loan, that therefore they were affected for purposes of FIRREA.

19 THE COURT: Why is that?

20 MS. JONES: Because the courts have required a new or
21 increased risk, which the government agrees is the standard.
22 In cases where a bank is in the business of making loans, which
23 naturally carried a risk, courts both in Stargel and in
24 Mullens, the Ninth Circuit and the Tenth Circuit.

25 THE COURT: I've heard of those.

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1 MS. JONES: They've looked at the comparison of the
2 loans that the bank makes that are allegedly affected by the
3 fraud and loans that aren't. Because they know the loans
4 always carry risk. So Stargel when the court was asked is
5 there sufficient evidence of an affect, it looked for and found
6 testimony in the record comparing the rate of default with
7 loans affected by fraud versus the rate of default of loans not
8 affected by the fraud.

9 THE COURT: Explain to me if, because of fraudulent
10 misrepresentations, you purchase loans that you would not
11 otherwise have purchased. Even with an indemnification
12 provision, because you never know what the economic situation
13 is going to be subsequently, why isn't that by its very nature
14 an increased risk? It is a risk you would not have otherwise
15 assumed.

16 MS. JONES: So the relevant risk here, your Honor, is
17 the risk to the banks that issued and sold the loans, not the
18 risk to the purchaser.

19 THE COURT: That's right.

20 MS. JONES: So in this instance, it is the risk of
21 repurchase. The risk that Fannie Mae or Freddie Mac will
22 decide that this loan has --

23 THE COURT: The risk that you will be subject to
24 liability for fraud in one sense or another.

25 MS. JONES: I don't know that's the risk that the

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1 government is relying on.

2 THE COURT: I'll hear from the government. But isn't
3 that the obvious risk? If the allegation is you committed
4 fraud, that clearly is the allegation, there is no question
5 about that. And as a result of the fraud, Fannie Mae and
6 Freddie Mac purchase stuff they wouldn't otherwise have
7 purchased, thereby exposing you, the seller, to any and all
8 liabilities that would arise as a result of fraud.

9 MS. JONES: And that's a legitimate argument if you
10 compare that risk of liability resulting from fraud to the risk
11 of liability that would arise out of non-fraudulent loans. If
12 I understand you correctly, your Honor, you are saying that's a
13 new or increased risk.

14 THE COURT: But, there are all sorts of liabilities
15 arising from fraud that don't arise otherwise.

16 MS. JONES: Right.

17 THE COURT: The other loans you only have your
18 contractual remedies. In fraud, you don't need any contractual
19 remedies. You have all the other remedies afforded by law.
20 And there is also, as I mentioned, the criminal possibility as
21 well. So, I'm still having trouble with your argument.

22 Let me hear from the government. We'll come right
23 back to you.

24 MS. JONES: I think we're agreeing with each other,
25 your Honor.

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1 THE COURT: That's always a good thing.

2 MS. JONES: Thank you.

3 MR. ARMAND: Good morning, your Honor. The
4 government's position with regard to affect is that Countrywide
5 Bank and BANA were both affected from all loss, liabilities,
6 risk that flow from the fraud. So, to the extent that the
7 government demonstrates that the fraud has occurred, I believe
8 we would essentially at the end of the case move for a directed
9 verdict on affect.

10 THE COURT: That's really my view. Directed verdict
11 may be the wrong word. But, I don't think there is a separate
12 issue for the jury. I think that if a fraud is proven, you
13 don't have to show affect, because it follows on the facts of
14 this case automatically. If the fraud is not shown, of course
15 you lose, so they don't have to worry about whether or not you
16 showed affect.

17 We can take this up further I suppose as we move
18 forward. But for the moment the motion in limine that we've
19 just heard is denied.

20 I mentioned, and let me make sure that no one
21 disagrees that the question of penalties, what is sometimes
22 referred to as damages, but really is a subsetting of how
23 penalties are computed, would be for the Court. Is there a
24 separate claim for damages here?

25 (Continued on next page)

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1 MR. ARMAND: No, your Honor.

2 THE COURT: So I think then in that case -- I want to
3 hear from defense counsel in a minute, but I think then that
4 any testimony or evidence relating to penalty/damages should be
5 heard by the Court after the jury has returned its verdict.
6 Immediately after, not after any delay.

7 MR. ARMAND: Your Honor, just on at that issue, the
8 one caveat is that loss resulting from fraudulent conduct is
9 still admissible to show intent.

10 THE COURT: I don't know about that. Why is that?

11 MR. ARMAND: It's circumstantial evidence.

12 THE COURT: Is it? Loss can occur for hundreds of
13 reasons in this kind of a market. There are certain
14 circumstances where the only rational or plausible reason for
15 assuming loss is a fraud, and then it might be admissible. But
16 here there are multiple market reasons why loss could occur for
17 other reasons. If I were to allow you to put in evidence of
18 loss as shown by intent, then of course it would open the door,
19 would it not, to putting in all the defense stuff about how the
20 other loans did even worse. In fact, I think it would be
21 impossible for the defense to defend against your argument
22 without showing that. I think the whole thing is irrelevant on
23 the facts of this case, so far as the jury is concerned. It
24 may bear on my computation of damages if we get there.

25 So anything from the defense?

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1 MS. MAINIGI: No, your Honor, we're in agreement.

2 Your Honor, with respect to motion in limine, the
3 government motion in limine one, are you willing to hear
4 argument on that for reconsideration or not?

5 THE COURT: I don't know if I want to open that door.
6 I will hear you very briefly because the jury panel is ready
7 and we need to pick our jury, but I'll give you a couple of
8 minutes.

9 MS. MAINIGI: Thank you.

10 MR. SINGER: Craig Singer. I'll be very quick. I
11 think your Honor just stated the Court's views on whether
12 evidence of loss can be relevant to the element of intent, and
13 that therefore goes to whether evidence that there was no loss
14 would also go to the element of intent.

15 THE COURT: Seems equally irrelevant to me.

16 MR. SINGER: Our principal argument is if you get to
17 one you exclude the other.

18 THE COURT: I agree with that, therefore I'm excluding
19 them both.

20 MR. SINGER: I understand your Honor's ruling on that.

21 The same evidence, though, would also be relevant to
22 three other elements of the supposed effects. The effects
23 element may depend on the outcome of your exchange with my
24 colleague a few minutes ago, but it would also be relevant to
25 the element of scheme because we believe that there is evidence

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1 that there's no deception of the purchaser if the loan that the
2 purchaser is buying is the same as the loan that the purchaser
3 intended to buy. That's not deceptive.

4 THE COURT: To take an extreme hypothetical, if I
5 concocted a scheme to deceive you into buying a loan, and by
6 chance the loan that you bought and another loan that wasn't
7 part of the scheme that you bought were so lousy that they all
8 went down, would have gone down even without the scheme, you're
9 still guilty of fraud.

10 MR. SINGER: In your hypothetical I think I would
11 agree, but we're not talking about one loan that happened
12 turned out to be different than expected, we're talking about
13 thousands of loans. We're talking about many loans. So in the
14 aggregate, if all of the loans turned out to be no worse than
15 the loans that were conceded not to be fraudulent, that to me
16 is evidence of --

17 THE COURT: That's not the way the mail fraud and wire
18 fraud statutes are constructed, they're constructed on the
19 basis of the scheme, that in effect your argument comes down to
20 no harm, no foul. That's not the law of mail fraud and wire
21 fraud.

22 MR. SINGER: I entirely agree that no harm, no foul is
23 not the law. The argument I'm making is a little different.
24 The fact that the loans that the purchaser was buying were the
25 loans that the purchaser expected to buy means that the

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1 purchaser was not deceived. That doesn't mean I'm not saying
2 that your Honor should throw out the case for that reason, but
3 I think there is relevant evidence to show to the jury that
4 there's no deception.

5 THE COURT: Well, I hear your argument.

6 MR. SINGER: Let me give you one more element,
7 materiality, because the argument is very similar on
8 materiality, because if the loan that the purchaser -- the
9 supposedly defrauded purchaser is buying has the same value or
10 better and is the same loan or better than the purchaser
11 believed that he or she was buying then there's no material
12 misrepresentation about that loan. And if we could show that
13 is true --

14 THE COURT: Materiality, is it not, in this situation
15 is if you had known X, would you have purchased? And if the
16 answer is no, that shows it's material. That's the kind of
17 hypothetical I will allow, by the way.

18 MR. SINGER: I think, your Honor, that would be a
19 securities fraud-type standard of materiality for purposes of
20 purchase of a security. For the purpose of mail and wire
21 fraud, I think if you look at the cases that we have cited, the
22 *Rigas* case is one, the Court looks at more than just whether
23 the buyer would have bought the loan or not, the Court looks at
24 whether it affected the underlying value of what the buyer was
25 purchasing.

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1 THE COURT: You've made that argument before, and it's
2 a very clever one. Unfortunately, it doesn't persuade me.

3 MR. SINGER: I have done my best, your Honor.

4 THE COURT: Very good. Now to all the folks in the
5 audience, with apologies, when the jury panel comes in in about
6 a minute you're all going to have to either stand or there's an
7 overflow room in 9B, but you'll need to vacate the seats until
8 we pick the jury.

9 MS. MAINIGI: Your Honor, apologies for interrupting.
10 We have a pending letter on the issue of the ability to do
11 contemporaneous jury research.

12 THE COURT: Yes. Unless the government wanted to be
13 heard, I'm prepared to grant that.

14 MR. ARMAND: The government doesn't have a position on
15 it, your Honor.

16 THE COURT: OK. That's permitted.

17 MR. MUKASEY: Judge, Marc Mukasey on behalf of
18 Ms. Mairone.

19 THE COURT: I recognize you from your hair.

20 MR. MUKASEY: Those were the days.

21 Judge, a couple of times in ruling on the in limine
22 motions your Honor referred to the High Speed Swim Lane as the
23 "Hustle."

24 THE COURT: I won't refer to it that way in my
25 statements to the jury. Whether there will be evidence to

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1 whether it was referred to as that or not is a different
2 question. But I was just doing that for brevity sake. The
3 complaint, of course, refers to it that way, but I will refer
4 to it as the HSSL, and you can all translate that as you see
5 fit.

6 MR. MUKASEY: Thank you, your Honor. The second quick
7 issue is there are a couple of jury consultants in the
8 courtroom. We understand your Honor's practice with respect to
9 jury consultants, and if your Honor is inclined to introduce
10 them as quote, unquote, jury consultants.

11 THE COURT: You're going to introduce them as jury
12 consultants. I'm going to call on each side to introduce
13 everyone, and you will introduce -- when the lawyers introduce
14 themselves they will say I'm a lawyer so and so, my name is
15 such and such, my law firm is such and such, I represent such
16 and such, here is my colleague lawyer so and so, here is my
17 colleague paralegal so and so, and here is so and so, who is a
18 jury consultant who works for a separate company named such and
19 such who here to help us select the jury.

20 MR. MUKASEY: And your Honor will require them to be
21 referred to as a jury consultant?

22 THE COURT: Absolutely, because I believe in truth.

23 MR. MUKASEY: I'm with you on that one.

24 THE COURT: Very good.

25 MR. HEFTER: One more issue, Michael Hefter, on behalf

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1 defendant Mairone. When you laid out the procedure for jury
2 selection you were clear about when the parties will exercise
3 peremptory or not exercise a peremptory.

4 THE COURT: Thank you for raising that. I am going to
5 pick a jury of ten, and therefore, give four challenges to each
6 side.

7 MR. HEFTER: My question to your Honor is I think you
8 explained to us once there are jurors in the box and the
9 parties are prepared to exercise their peremptories, we will
10 then replace that person if the parties so choose. Is it your
11 Honor's practice that the parties, with respect to, for
12 example, after round one where each party hypothetically still
13 has two or three challenges left in this case, that you could
14 then back challenge against other members who were already in
15 round one?

16 THE COURT: Yes.

17 MR. HEFTER: Thank you.

18 THE COURT: The fact that you used your challenge to
19 for juror number two doesn't mean you can't challenge juror
20 number three who you didn't challenge in the first round, you
21 can challenge on the second round or whatever.

22 MR. HEFTER: Thank you.

23 MS. MAINIGI: Your Honor, for clarification, when the
24 jury comes in, we, on behalf of the bank defendants, will not
25 be using a jury consultant to help select the jury.

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1 THE COURT: All right. Too expensive, I guess.

2 MR. ARMAND: Sorry, your Honor, one last housekeeping
3 issue. The parties entered into a voluntary -- stipulation of
4 voluntary dismissal for certain of the entity defendants, just
5 to make things a little easier.

6 THE COURT: Let me see it.

7 MR. MUKASEY: Judge, we're going to dismiss our jury
8 consultant as well.

9 THE COURT: OK.

10 MR. ARMAND: May I approach?

11 THE COURT: Yes.

12 So just so that I'm clear, the remaining defendants,
13 now that you have dismissed Countrywide Financial Corporation
14 and Bank of America Corporation, are Countrywide Bank,
15 Countrywide Home Loans, Inc., Bank of America NFA, and Rebecca
16 Mairone, yes? Those are the remaining defendants?

17 MR. ARMAND: Yes, your Honor.

18 THE COURT: OK. Very good. By the way, am I
19 pronouncing that right, Mairone?

20 MR. MUKASEY: You got it.

21 THE COURT: Very good. Ladies and gentlemen, if you
22 will all, with apologies, leave your seats, and we'll bring in
23 the jury.

24 MR. ARMAND: Your Honor, to the extent there are
25 issues about demonstratives, demonstrative exhibits for the

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1 statements, is that something that you wanted to hear now?

2 THE COURT: We'll take a break before that.

3 (Voir dire proceedings commenced, recorded,
4 transcribed, and contained in separate transcript)

5 (Trial transcript contained on next page)

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1 THE DEPUTY CLERK: Will the jurors please rise and
2 raise their right hands.

3 (A jury of 10 was impaneled and sworn)

4 THE DEPUTY CLERK: Please follow me into the jury
5 room.

6 (Jury not present)

7 THE COURT: So to the other jury members who dodged
8 the bullet, you're not totally off the hook yet. We're going
9 to send your cards down and you should go down right now to the
10 same room you came up from on the first floor. And of course
11 you may still be called for duty in another jury. But I want
12 to thank you all very much for being available for jury
13 service.

14 Anything counsel needs to raise with the Court?

15 MR. SULLIVAN: One issue, yes. Yesterday at 1 we
16 submitted our demonstratives for opening for the government.
17 They indicated the first three are okay. They said they would
18 not agree to the last demonstratives. They don't give a reason
19 why.

20 THE COURT: Let me see it.

21 MR. SULLIVAN: In fact, your Honor, if you'd like to
22 look at it over lunch and tell me afterwards --

23 THE COURT: We might as well deal with it right now.
24 So, let me hear from the government.

25 MR. ARMAND: Your Honor, I think we can actually pare

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1 some of this down. I think it is really the first six are not
2 in issue. With regard to seven, the underlying of
3 underwriting, the argument is that CLUES was their automatic
4 underwriting system --

5 THE COURT: You need to speak louder.

6 MR. ARMAND: I'm sorry. Their argument is that the
7 automated underwriting system replaces this performing the role
8 of the human underwriter. And so, these exhibits
9 demonstratives they're essentially misleading from the
10 government's perspective.

11 THE COURT: You're saying that the ones that deal with
12 CLUES which are numbers seven through 14.

13 MR. ARMAND: I shouldn't say misleading, but they're
14 argumentative is really the -- and the suggestion being that
15 the automated underwriting system is replacing the role of the
16 human underwriting. But the underlying of underwriting and
17 CLUES analyzes in paren underwrites the loan. That's on page
18 10.

19 THE COURT: So, you're saying what, that this is
20 irrelevant?

21 MR. ARMAND: No, just that it is argumentative, your
22 Honor.

23 THE COURT: Argumentative in what respect?

24 MR. ARMAND: Well, it's the government's position that
25 the automated underwriting system is a tool but it doesn't

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1 replace the human underwriters.

2 THE COURT: So they are going to be presenting
3 evidence, if I understand what you're saying, that it is a tool
4 that they use that they think does the job or affords adequate
5 protection or whatever they're going to argue from that.
6 Assuming that's admissible, then why shouldn't they be able to
7 explain on opening statement how that system works?

8 MR. ARMAND: I don't have a problem with that. Just
9 having it on a demonstrative.

10 THE COURT: Oh. Overruled.

11 MR. ARMAND: The last page, page 19, this is really
12 the same issue is that it is just argumentative. And it is one
13 thing to say it, but to place it on a demonstrative before all
14 this has been in evidence.

15 THE COURT: If the argument is that something that
16 they would be permitted without objection to say in opening
17 statement can't be said visually through a chart, that
18 objection is overruled. I see no basis for that. So the
19 objection is overruled.

20 Anything else that anyone wants to raise?

21 MR. SULLIVAN: Nothing further.

22 THE COURT: I go ahead.

23 MR. ARMAND: The government does have a few
24 housekeeping issues.

25 THE COURT: Go ahead.

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1 MS. SCHOENBERGER: Yesterday afternoon the government
2 submitted a marked up transcript for the deposition testimony.

3 THE COURT: Yes, thank you very much for that.

4 MS. SCHOENBERGER: And we just ask for the Court's
5 rulings with respect to the objections, only because we'll need
6 to wait on those before we can finalize the video that will be
7 played for the jury.

8 THE COURT: Let's talk about that. What is the
9 government's order of witnesses?

10 MS. SCHOENBERGER: The order is affected by a second
11 application that the government needs to make.

12 THE COURT: All right. First of all, who is your
13 first witness? Have you determined that?

14 MS. SCHOENBERGER: Yes, it's Michael Thomas.

15 THE COURT: How long is he going to take on direct?

16 MS. SCHOENBERGER: I imagine he'll take the rest of
17 today.

18 THE COURT: Okay. So, at the end of each day, I need
19 to know which depositions are likely to be introduced by either
20 side two days hence. Because my experience is that I should
21 not rule on the deposition objections until relatively close to
22 the time when they are presented because it may be affected by
23 other rulings and other testimony that comes in in the
24 meantime. But I know that you need at least 24 hours in
25 advance to do the editing.

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1 So, you need to tell me 48 hours before, I will get it
2 back to you the next morning, and you'll have essentially a day
3 and a half to make your edits.

4 So is there any deposition that's coming up in the
5 first two days?

6 MS. SCHOENBERGER: Mr. Price's deposition will be a
7 part of the first two days I believe. And the second
8 application is that the government would make is to present
9 testimony from John Boland by video deposition. Mr. Boland was
10 originally planning to attend trial live. The government'
11 first found out this weekend and it was confirmed yesterday,
12 Mr. Boland will not be attending trial. We've not designated
13 his testimony previously.

14 THE COURT: Where is he residing?

15 MS. SCHOENBERGER: He lives in Texas and he is a
16 former Countrywide employee.

17 THE COURT: And he did not accept a subpoena
18 voluntarily at the time when he was in agreement to testify?

19 MS. SCHOENBERGER: That is correct.

20 THE COURT: You didn't serve him? You didn't try to
21 give him one or he just didn't accept it?

22 MS. SCHOENBERGER: We did not think a subpoena was
23 necessary and didn't serve him one.

24 THE COURT: Because that might have given me
25 jurisdiction over him that I don't have now. Because he would

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1 have voluntarily accepted the subpoena if he was willing at
2 that time to voluntarily appear. So, if he's outside the
3 Court's ability to order him here, I'll hear from your
4 adversary in a minute, but that would be a reason to put in his
5 deposition.

6 Now, before we deal with that, remind me who Mr. Price
7 is.

8 MS. SCHOENBERGER: Mr. Price is also -- I believe he
9 may be a former employee now. At the time the government
10 deposed him, he was a current employee of Bank of America.

11 THE COURT: Is if he is a current employee of Bank of
12 America, then why is he not here live?

13 MS. SCHOENBERGER: I don't believe he is a current
14 employee today.

15 THE COURT: Pardon?

16 MS. SCHOENBERGER: I don't believe today that he is a
17 current employee.

18 THE COURT: He is a former employee?

19 MS. SCHOENBERGER: Yes.

20 THE COURT: Where is he residing?

21 MS. SCHOENBERGER: He's also in Texas.

22 THE COURT: Okay. I will get to his deposition then,
23 make the rulings tonight. That's the best I can do for you
24 obviously.

25 Let me hear from the defense if there is any objection

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1 to this fellow who is no longer willing to appear.

2 MS. MAINIGI: With respect to Mr. Boland, we have two
3 related issues. First, with respect to Mr. Boland, the
4 government found out this weekend that Mr. Boland might not be
5 coming. We have of course, because he was supposed to be the
6 second live witness for the government, spent hours and hours
7 preparing for his deposition. And it was only at --

8 THE COURT: Preparing for his testimony.

9 MS. MAINIGI: Excuse me. Preparing for his testimony,
10 your Honor. It was only at 7 o'clock last night that the
11 government sent us an e-mail indicating that Mr. Boland would
12 not be coming to trial and they'd already prepared their
13 deposition designations and sent them along to us.

14 So we do have an issue two fold with Mr. Boland. One
15 is notice, but second it upsets the schedule that we have,
16 because they want to do some shuffling of the other witnesses.
17 And we have an application of our own, your Honor. I hate to
18 detour you off on another issue, but I think all of these
19 issues could be considered together. We have an application
20 related to Ed O'Donnell that we would like to make. Do you
21 want me to --

22 THE COURT: Well --

23 MS. MAINIGI: -- explain that to you right now?

24 THE COURT: Let me just tell you now. That no matter
25 what you convince me variously of, there will never in the next

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1 five weeks be any time when we're not going to have the jury
2 here because, quote, the next witness is not available or
3 anything like that. If at any time a party on whose case we're
4 on is not ready with their next witness, that will end that
5 party's case with prejudice and without further argument.

6 Understood?

7 MS. MAINIGI: Yes, your Honor.

8 THE COURT: So, what is the story with Mr. O'Donnell
9 is his name?

10 MS. MAINIGI: Mr. O'Donnell, we only found out last
11 week, your Honor, that Mr. O'Donnell, who had previously been a
12 relator in the false claim act portion of the case, that he is
13 also a FIRREA whistle blower. That was information that the
14 government has had all along that has never been disclosed to
15 us. It was not disclosed to us prior to his deposition. We
16 were never provided with a copy of the FIRREA declaration.

17 Last week we received an update to the privileged log
18 and we're told that the government had inadvertently left off
19 the entry related to Mr. O'Donnell's FIRREA declaration. We
20 inquired as to why that document was privileged in the first
21 place. We had some exchanges with the government. Ultimately
22 the government ended up producing that document to us on
23 Thursday evening.

24 Since that time -- and that document is dated
25 February 24, 2012, your Honor. Or excuse me, February 23,

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1 2012, the same time the false claims act suit was filed by
2 Mr. O'Donnell. Since that time we have asked repeatedly
3 whether we could take a brief deposition of Mr. O'Donnell to
4 inquire as to the declaration, because that should have been
5 produced prior to his deposition, and the government has turned
6 us down in that regard.

7 So, the O'Donnell issue is somewhat related to
8 Mr. Boland in that now that Mr. Boland is not coming live,
9 there will be a desire on the part of the government to move up
10 Mr. O'Donnell's testimony. We would like to get his deposition
11 in prior to that.

12 MR. MUKASEY: If I can just add a quick footnote to
13 that. We join in the bank's application to depose
14 Mr. O'Donnell on the basis of his previously withheld
15 affidavit. Primarily because the affidavit specifically refers
16 to Ms. Mairone in her professional capacity as the former chief
17 operating officer of Countrywide FSL division. It is an issue
18 that we did not know about.

19 THE COURT: This is not a criminal case. There is not
20 a Brady obligation. Did any of the parties here subpoena
21 Mr. O'Donnell with a subpoena, a duces tecum or other request
22 that would have required him to produce this document?

23 MS. MAINIGI: At the time, your Honor, the government
24 had possession of this document and the document is responsive
25 to defendant's document request number two. All documents the

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1 government received from the relator concerning the subject
2 matter of this action. And that document request is dated
3 November 2, 2012. So it was very much responsive to existing
4 document requests prior to Mr. O'Donnell's deposition.

5 THE COURT: How long a deposition do you want?

6 MS. MAINIGI: I don't need more than a couple hours,
7 your Honor.

8 THE COURT: That's collective?

9 MR. MUKASEY: Agreed. Yes.

10 THE COURT: Let me hear from the government.

11 MR. ARMAND: I think one thing that's being left out
12 is the declaration is essentially cut and pasted, or the
13 complaint that -- the relator's complaint that the false claims
14 act complaint cuts and pastes from the declaration, the FIRREA
15 declaration. There is no new information in there. We can
16 provide the Court with a copy both the declaration and the
17 complaint.

18 THE COURT: I will give the defense a one-hour
19 deposition limited to the FIRREA matter to be conducted -- when
20 does the government want to call Mr. O'Donnell?

21 MR. ARMAND: If we were able to play Mr. Boland's
22 testimony after Mr. Thomas, the thought was we would -- most
23 likely tomorrow. Depending how fast Mr. Thompson's testimony
24 goes. The other point, your Honor, is Mr. O'Donnell has his
25 own counsel. The government doesn't control him.

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1 THE COURT: Mr. O'Donnell's deposition, he will have a
2 one-hour deposition at a time set by the Court, regardless of
3 his counsel's schedule. I'm sure counsel will be make himself,
4 him or herself available. Thomas is today. How long is he
5 going to be on direct?

6 MR. CORDARO: Your Honor, I would expect two to three
7 hours. Probably for the rest of today and into early tomorrow.

8 THE COURT: This is not binding, but if someone can
9 give me a ballpark from the defense of how long cross you think
10 will be.

11 MR. SULLIVAN: Probably about the same.

12 THE COURT: Okay. So that takes us to probably mid to
13 late morning tomorrow. And how long is Mr. Price?

14 MS. SCHOENBERGER: Mr. Price is video.

15 THE COURT: That's the one I've got to do tonight.
16 Lucky me. So, how long is that video?

17 MS. SCHOENBERGER: I think it will be in the range of
18 two hours. The only hiccup is that it will need to be edited
19 before we can play it based on the Court's rulings with respect
20 to objections.

21 THE COURT: I think we should do the following: I
22 think after the midafternoon break, I would like to have
23 separate telephone conferences with Mr. Boland and Mr. Price to
24 find out why they're not willing to make themselves available.
25 If they're represented by counsel, obviously, we'll need

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1 counsel on those calls and of course I would want the counsel
2 for the parties here on those calls. If I'm unsuccessful in
3 persuading them to come here, then I will decide on how we will
4 proceed.

5 I think, though, one should assume that the O'Donnell
6 deposition will should either occur tonight or early tomorrow.
7 You may recall that we all had our arm twisted to begin at
8 9:30, rather than 9, and I didn't hear any protest to that.
9 So, you could do his deposition, for example, tomorrow morning
10 between 8 and 9. But, tonight would be preferable if you can
11 arrange it tonight. Then let's talk about where we stand with
12 Boland and Price after we've talked to them.

13 MR. SULLIVAN: Excuse me, your Honor. And one more
14 thing. You allotted 30 minutes on opening for Bank of America
15 and 10 for Countrywide. Since I'm doing them all, can I have
16 the extra 10 if I need it?

17 THE COURT: Yes. I actually thought about that a
18 little bit. I am going to give the government 40 minutes
19 instead of 35. I'm going to give the banks collectively 40
20 minutes as well. And then 15 minutes if I recall is what
21 counsel for Ms. Mairone, yes?

22 MR. MUKASEY: Yes.

23 THE COURT: Okay.

24 MR. ARMAND: Just with regard to the Court's rulings
25 on the motions in limine. I just wanted to verify since now

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1 the losses are not something that's going to be presented to
2 the jury, we still think that what happened to the loans in
3 terms of default rates for High-Speed Swim Lane loans are still
4 relevant to whether or not they're quality loans, so we plan to
5 put on evidence at least of what the percentage are of the
6 defaults and how many ended up in foreclosure. That sort of
7 thing.

8 THE COURT: That's slightly different from the issue
9 before which dealt with losses.

10 MR. ARMAND: Correct.

11 THE COURT: Yes.

12 MS. MAINIGI: Your Honor, we don't see any reason why
13 losses would in any way be or foreclosure --

14 THE COURT: I've already ruled out losses. This is a
15 little bit different though. But, I'm not sure it is really
16 different in kind is what you are saying.

17 Here's what the government has never been able to
18 explain to me. In the economic situation of the time, there
19 are all sorts of reasons why these mortgages would have gone
20 into default. And so, I don't know what it is probative of.
21 The jury has no rational way of determining that the reason
22 that any given loan or group of loans went into default was
23 because of fraud as opposed to a million other things. Plus,
24 if I did admit that evidence, then it seems to me, I would have
25 to admit what the government already moved successfully to have

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1 me exclude, which is what happened to other loans that were not
2 part of this program. And then, the government, if I get that,
3 will come back and say well those other loans shared some of
4 the characteristics of the HSSL loans. So, we would now take a
5 quite straightforward case that has been appropriately
6 narrowed, and turn it into a gigantic mess. All on the basis
7 of speculation. So I do not see why the government should be
8 able to introduce that.

9 So I'll see you at 2 o'clock.

10 MS. SCHOENBERGER: Your Honor, with the Court's
11 permission, we have a two paragraph letter that attaches the
12 Boland deposition and describes the situation, and also brings
13 to the Court's attention potential discrepancy in the testimony
14 of the witness. With your permission we can submit that to you
15 at this time.

16 THE COURT: Sure. It's been 24 hours and you haven't
17 phoned, you haven't written, I was feeling so deprived. So
18 sure, that's fine.

19 (Recess)

20 (Continued on next page)

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AFTERNOON SESSION

(2:15 p.m.)

MR. ARMAND: Your Honor, a quick point of clarification before we bring in the jury. I want to make sure it's appropriate, one of the major issues is whether or not the loans were investment quality. And investment quality, the government's position will be in the case, that the borrower needs to be able to repay the loan. So I am intending to say during the opening statement that the investment quality is that borrowers were able to repay the loan.

THE COURT: That you can say.

MR. ARMAND: Thank you.

THE COURT: All right. We were held up, by the way, because one of the jurors was in one of those long lines. So I flag that for counsel because this courthouse unfortunately, when there are so many trials going on, the line tends to be quite long. So bear that in mind.

Please be seated, let's bring in the jury.

(Continued on next page)

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1 (Jury present)

2 THE COURT: So ladies and gentlemen, we're going to
3 now hear the opening statements of counsel. I want to tell you
4 at the outset that nothing that counsel says is evidence. The
5 evidence will come from only three places, from the testimony
6 of witnesses, from exhibits that are received in evidence, such
7 as documents, and occasionally there will be what is called a
8 stipulation where the parties agree on some fact. Those are
9 the only sources of evidence.

10 So you may ask why we even have opening statements.
11 Well, it's because the evidence is going to come in one little
12 bit at a time, and so it will be a while before you have the
13 overall picture, but it may be useful for do you know what each
14 side believes the evidence will or will not show, as the case
15 may be. In other words, this is kind of an overview, but from
16 the perspective of the two competing sides. They're obviously
17 going to have very different views of what the evidence will
18 show or not show, but by hearing those you'll have a little bit
19 of a road map, a little bit of a feeling for what the evidence
20 is all about as we go forward. In addition, probably by the
21 end of this week I may give you a little bit an overview of
22 some of the legal issues to help you focus on that as well.

23 The government has what we call the burden of proof,
24 which means that they have to prove that it is more likely than
25 not that the facts are as they say they are. So for that

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Opening - Mr.Armand

1 reason, the government goes first.

2 So counsel.

3 MR. ARMAND: Thank you, your Honor.

4 Good afternoon. My name is Pierre Armand. I'm an
5 Assistant United States Attorney for the Southern District of
6 New York.

7 Ladies and gentlemen, this case is about how in 2007,
8 when the mortgage industry was in turmoil, a bank that was
9 blinded by greed and focused solely on profits sold thousands
10 and thousands of bad mortgage loans, loans that knew that were
11 bad, with lies. That bank is Countrywide Bank, the defendant
12 in this case, now a part of Bank of America.

13 At the very time that it needed to be focused on the
14 quality of its loans, making sure that the loans were quality,
15 it did the exact opposite. It started a new process for making
16 loans to borrowers buying homes at super high speed. It made
17 the loan application process so fast that a person could get a
18 loan for hundreds of thousands of dollars for a house in a
19 single day. And at the same time, Countrywide gutted the
20 quality checks to ensure that the loans that they were making
21 were loans that borrowers could actually afford to pay back.
22 The process was called the High-Speed Swim Lane or HSSL, or for
23 short, the Hustle.

24 Now the person at Countrywide back who was pushing the
25 Hustle was defendant Rebecca Mairone, the chief operating

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Opening - Mr.Armand

1 officer of Countrywide's Full Spectrum Lending division.

2 Through the Hustle, Countrywide made thousands and thousands of
3 terrible quality mortgage loans, loans that were not likely to
4 be paid back.

5 And what did Countrywide do with those loans? It sold
6 them to Fannie Mae and Freddie Mac with lies that they were
7 quality loans.

8 Now who are Fannie Mae and Freddie Mac? They sound
9 like people but they are actually government-sponsored
10 organizations. Congress created them in order to help support
11 the mortgage market.

12 Now Fannie Mae and Freddie Mac are nicknames. Fannie
13 Mae stands for the Federal National Mortgage Association, and
14 Freddie Mac stands for the Federal Home Loan Mortgage
15 Corporation.

16 Now Fannie and Freddie, as I said, were created to buy
17 mortgage loans from banks so that the banks would be able to
18 get their money back from the loans they just issued and they
19 would have more money in their pockets to make more loans for
20 borrowers so more people could have homes. But the system only
21 works if the loans that are being sold to Fannie Mae and
22 Freddie Mac are quality loans, loans that borrowers are able to
23 afford to repay. They can't be lemons.

24 And the way that Fannie and Freddie try to ensure that
25 the loans that they're buying are ones that are likely to be

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Opening - Mr.Armand

1 paid back, are not lemons, is by making the banks -- requiring
2 them to make what lawyers like to call representations and
3 wanties. And that's basically a promise. It's a promise that
4 each and every loan is an investment quality loan, not a lemon,
5 a loan that is likely to be paid back.

6 And another thing, Fannie and Freddie, they're not --
7 they have to do this because Fannie and Freddie are not
8 involved directly with the borrowers when the borrowers are
9 getting the loans. They're buying them from the banks. And
10 also Fannie and Freddie are buying so many different loans for
11 so many different banks they can't look at the loans
12 themselves, review them personally, all of them, before they
13 buy them. So they have to rely on the representation, the
14 promise from the banks that they're investment quality. And
15 there's a term you're going to hear quite a bit during the
16 trial. It means it's a loan, not a lemon, a loan that's likely
17 to be paid back.

18 And Countrywide made that promise to Fannie and
19 Freddie thousands and thousands of times for each loan. And
20 those promises were lies because the bank knew that the loans
21 that it was selling to Fannie and Freddie were terrible quality
22 loans. They were rush job, slap dash, Hustle loans that they
23 knew were bad and they sold them as good.

24 But the deception didn't stop with the lies when they
25 were sold. In addition to that, Fannie and Freddie required

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Opening - Mr.Armand

1 the banks to report to them if they find out that any loan that
2 they sold is a lemon. Do you know how many of the terrible
3 quality High-Speed Swim Lane loans that Countrywide reported to
4 Fannie and Freddie out of thousands that they knew about? Six,
5 six loans out of thousands that they knew about.

6 And why did Countrywide do this? For the money.
7 Because the Hustle loans provided short term revenues, a quick
8 boost of revenues, about \$165 million worth. And that is why
9 we're here today, ladies and gentlemen, because of this massive
10 fraud by Countrywide Bank and Ms. Mairone.

11 Now let me explain to you briefly the legal claim that
12 the United States has brought. Now in 1989 Congress created a
13 law call FIRREA. It stands for the Financial Institutions
14 Reform Recovery and Enforcement Act. And that law authorizes
15 the United States to bring a lawsuit against people or
16 corporations that commit fraud. And the fraud that the
17 government will prove to you occurred in this case is a
18 violation of the mail and wire fraud laws. And very simply,
19 that's just a fraud that involved the use of U.S. mails or
20 wires, meaning telephones or emails. But to be clear, this is
21 a civil case. It's not a criminal prosecution. At the end, if
22 you find by a preponderance of the evidence, which is more
23 likely than not, that a fraud has been committed, then the
24 judge can order the defendants to pay money in the form of
25 civil penalties.

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Opening - Mr.Armand

1 Now I would like to tell you a little bit about what
2 the evidence will show during the trial, and then I would also
3 like to tell you about some of the kinds of evidence that
4 you're going to see during the trial. And what we'll prove to
5 you is that Countrywide Bank and Ms. Mairone knew that they
6 were selling bad quality loans to Fannie and Freddie with lies.

7 So I'm not going to walk you through all of the
8 evidence, everything that's going to be presented to you, but I
9 do want to preview for you some of the evidence that is
10 important. Before I start doing that, let me give you a little
11 bit of background information about mortgages and loans to help
12 put this all in context.

13 So banks lend money to borrowers so they can buy
14 houses if they think that the borrowers will be able to pay the
15 loan back, and banks make money by charging the borrowers
16 interest on those loans. Now banks can also make money by
17 taking that loan and selling it to somebody else. The bank
18 gets its money back and the person who buys the loan, they'll
19 make money if the borrower continues to pay.

20 And so not surprisingly, banks -- responsible banks
21 will lend money to people that they think will be able to pay
22 them back. And the way they do that is by using a person
23 called an underwriter. An underwriter is the person whose job
24 it is to look at your finances, to look at your income, your
25 employment, your credit history, and make a determination about

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Opening - Mr.Armand

1 whether or not you're able to pay the loan back. And you'll
2 hear that these are skilled employees. They have the
3 experience, they have the know how to make these
4 determinations. And as the evidence will show, this isn't how
5 things worked at Countrywide, the Hustle.

6 Now time and again Countrywide promises that the loans
7 that it was selling was quality loans, loans that borrowers
8 could repay. And time and again those promises were broken.

9 Let me set the scene for you. The evidence will show
10 it's August of 2007, the mortgage industry is in turmoil, the
11 financial crisis is looming, Countrywide's profits are down,
12 and they're looking for a way to get quick profits fast. So
13 what do they do? They come up with the Hustle, the High-Speed
14 Swim Lane. The High-Speed Swim Lane make as many loans as
15 possible with little regard to the quality of the loans.

16 So there are five basic parts of the evidence about
17 the Hustle that I want to preview for you. Number one, the
18 Hustle was not about quality, it was about speed, it was about
19 volume, it was about profits. The evidence will show that in
20 August of 2007 Countrywide's Full Spectrum Lending division
21 suddenly sped up the rate at which it was making loans to
22 people buying homes. And at the same time, they gutted the
23 quality safeguards that were there specifically to ensure that
24 the loans they were making were ones the borrowers would be
25 able to pay back.

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Opening - Mr.Armand

1 So why didn't Countrywide care about the quality of
2 the loans? Because the evidence will show that Countrywide
3 didn't intend to keep the loans on their own books. The plan,
4 you'll see, was to sell these loans to Fannie Mae and Freddie
5 Mac. And as I said earlier, Fannie and Freddie, they're not
6 able to review all of the loans before they buy them, and
7 they're relying on the promises from banks like Countrywide
8 these are investment quality loans, not lemons, loans that
9 people can afford to repay.

10 So how did Countrywide execute this scheme? Well,
11 you'll hear that the first thing they took away, first thing
12 they got rid of was the underwriter. The underwriter,
13 remember, that's the person whose job it is to make sure, look
14 at all of your financial information, look at your credit
15 history, and make sure that you can afford to pay back the
16 loan.

17 And the evidence will show that underwriters in the
18 Full Spectrum Lending division, they were experienced people,
19 generally had years of experience. They are trained. They had
20 the know how. And they also were independent from the people
21 who were making the loans, the people on the assembly line
22 making these loans. They were part of a separate department,
23 and their job was to ensure the quality of the loans. They
24 were an independent safeguard for quality.

25 Now you'll hear that Countrywide also had an automated

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Opening - Mr.Armand

1 underwriting system, a computer program that would assist the
2 underwriters doing their job. But it was a tool. It didn't
3 replace the human beings. It was the underwriters who were
4 doing the work with the experience and know how to determine
5 whether or not the borrowers could afford to repay the loans.

6 So before the Hustle, underwriters were used, and they
7 performed the task of looking at all of these income
8 information, looking all the documents in the file to determine
9 whether or not they could afford to pay. But Countrywide took
10 these people away. They took the experience veterans and sat
11 them on the bench and they put inexperienced rookies in the
12 field.

13 Who did they replace the underwriters with? They
14 replaced the underwriters with clerks. Clerks were called loan
15 specialists, but as you'll see and hear from the evidence the
16 loan specialists were not specialists at all. These were
17 generally entry level jobs for folks that didn't have very much
18 of any experience in the mortgage industry, and they weren't
19 considered qualified enough even to answer questions in
20 connection with their loan. Instead, their job had been mainly
21 to enter financial information from the loans, the loan
22 applications, into the automated computer system, and to also
23 gather the documents that the underwriters would review, people
24 who were actually making the determination about whether or not
25 the borrowers could repay the loan.

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Opening - Mr.Armand

1 Now you'll hear that when the underwriters were taken
2 away and quality is in the back seat to profit, the loan
3 specialists were also pushed to make as many loans as possible
4 as quickly as possible. And you'll hear that they set speed
5 quotas. You'll hear in addition to the speed quotas, that was
6 not enough, they also changed their pay, they gave them
7 financial incentives to move as quickly as possible and not
8 care about quality.

9 You'll see that Spectrum first gave a 25 percent bonus
10 for volume. When I say "volume," I mean producing a lot of
11 loans. They also gave a bonus for hitting speed targets. If
12 you were fast, you got a bigger bonus. In addition to that,
13 they stopped docking employees' pay for making bad loans. See,
14 before the Hustle, if you made bad quality loans, your pay got
15 docked, which is a reasonable thing to do if you're trying to
16 minimize bad quality loans, but after the Hustle you'll see you
17 could make bad quality loans and your pay would be secure.

18 And you'll also hear from the evidence that
19 Countrywide made matters worse by sending the loan specialists,
20 the clerks, out in the field to make underwriting decisions
21 without giving them proper training first. And you'll also
22 hear that the underwriters, the loan specialists, were simply
23 given underwriting authority, and any training that they got
24 was done on the fly, because, as I said, the Hustle was about
25 speed and volume, it wasn't about quality.

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Opening - Mr.Armand

1 And as you'll hear, Countrywide knew that the Hustle
2 would lead to poor quality loans because their own employees
3 told them it would. You'll hear the evidence will show that
4 employees at Countrywide warned that the Hustle would lead to
5 poor quality loans. The evidence will show that those warnings
6 fell on deliberately deaf ears. As I said, the Hustle was
7 about speed and volume and profit, not about quality.

8 That brings us to number two. The bank knew that it
9 was producing bad quality loans. So after the Hustle began in
10 August of 2007, did Ms. Mairone and others in Countrywide know
11 that the loans they were making were bad quality loans? Of
12 course they did. The evidence will show that underwriting
13 managers were so concerned about the impact that the High-Speed
14 Swim Lane would have on the quality of the loans that they
15 insisted on having a quality assurance process, a review of the
16 loans to see and test the quality of the loans as they were
17 being made. And you'll hear that Ms. Mairone only allowed the
18 quality assurance reviews to occur if they didn't slow down the
19 assembly line and the results of the reviews didn't go directly
20 to the clerks, the loan specialists who were making the loans.

21 And predictably, you'll see from the results of these
22 quality reviews, that immediately -- almost immediately after
23 the Hustle began, quality began to decline. You'll see the
24 quality assurance reports showing that in August, September,
25 October of 2007 there were problems with the loans. The

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Opening - Mr.Armand

1 percentages of loans that Countrywide, the Full Spectrum
2 Lending unit identified as high risk first were 21 percent,
3 then 41 percent, then 97 percent, then the 98 percent. And
4 high risk, as you will hear, meant there was a problem with the
5 loan that, if it was not corrected, could result in the loan
6 being severely unsatisfactory. "Severely unsatisfactory" was
7 an internal bank term that meant bad, not investment quality, a
8 lemon.

9 So think about that for a minute. Countrywide's own
10 internal documents were saying that over 90 percent of the
11 loans were being identified as high risk, yet at the same time
12 they're selling -- Countrywide is selling loans to Fannie and
13 Freddie and promising that they're investment quality and not
14 lemons.

15 That brings us to number three. The Hustle was
16 expanding despite the poor quality. So the evidence will show
17 that despite the warnings from employees, despite the red
18 flags, despite the 90 percent defect rates, the defendants
19 actually expanded the High-Speed Swim Lane. They expanded the
20 Hustle in October of 2007. They expanded it. They pushed for
21 more volume. They pushed for more loans. They added more
22 centers, funding centers they called them, to produce more
23 Hustle loans. They have more types of loans. And they
24 continued to have riskier loans in the High-Speed Swim Lane by
25 stating income levels where the borrowers aren't required to

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Opening - Mr.Armand

1 provide documentation of their income. So all of those loans
2 were going through the High-Speed Swim Lane and going to the
3 clerks, the loan specialists, to make underwriting
4 determinations for those folks to determine whether or not the
5 people could repay the loans.

6 And you'll hear that after the High-Speed Swim Lane
7 was expanded, the quality reports continued to show problems
8 with the quality. Month after month after month you'll see
9 reports from November, from December, from January, from
10 February of 2008. And those reports, Countrywide's own
11 reports, showed that 80 and 90 percent of the loans reviewed
12 had been flagged as action required. "Action required," like
13 "high risk" meant there was a problem with the loan, if it
14 wasn't corrected, resulting in the loan being severely
15 unsatisfactory. Again, "severely unsatisfactory" means the
16 loan was bad, not investment quality.

17 And so you'll hear that Countrywide personnel advised
18 Ms. Mairone and told her in November of 2007 that only a very
19 small percentage of the loans that had been found that had
20 problems were actually being corrected before they were going
21 out the door, before the loans were closing and being sold to
22 Fannie and to Freddie. So a very large portion of them had
23 problems that could make them severely unsatisfactory, not
24 investment quality.

25 So did Countrywide stop the Hustle and try to fix the

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Opening - Mr.Armand

1 quality problem then? Did Ms. Mairone or anyone else at
2 Countrywide pick up the phone and call Fannie Mae and Freddie
3 Mac and tell them there were problems with the quality of the
4 loans they were selling to them? No. You'll hear they pushed
5 for more speed and more volume.

6 By March of 2008, you'll hear the problems that Full
7 Spectrum Lending division, where the Hustle was launched, the
8 problems they were seeing in the loans were now starting to
9 show up in quality reviews that were being done outside of Full
10 Spectrum Lending division. See, the corporate quality control
11 group at Countrywide, they would do quality reviews for all the
12 divisions of Countrywide, including Full Spectrum, and they
13 found in March of 2008, 2008, which was the first time there
14 was a significant volume of Hustle loans that were included in
15 the reviews, that nearly one out of every three loans was
16 severely unsatisfactory, meaning it was bad, not investment
17 quality. And you'll hear that 30 percent was eight times the
18 industry standard defect rate. And again, that meant that one
19 out of every three loans they had been selling to Fannie and
20 Freddie coming from Full Spectrum Lending division were not
21 investment quality.

22 Now because the 30 percent defect rate was so
23 embarrassingly high, you'll hear that Full Spectrum Lending
24 division did everything they could to make that number
25 disappear, at least make it look like it was lower. And so

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1 what did they do? They created a new bonus called the sprint
2 incentive. And what this bonus did was it paid extra money to
3 employees in Full Spectrum if they could get the quality people
4 in the corporate quality department who had found the
5 30 percent defect rate to lower the rate. So what they did was
6 they paid a bonus to their employees to make the rate go down.

7 Now you will also hear that eventually, after about
8 nine months of the Hustle, even Countrywide began to recognize
9 that what they were doing was a terrible idea, people outside
10 of the Full Spectrum, and they said that it had to stop. What
11 did they do? They brought back the quality checks they had
12 taken out, such as the underwriters. But by then it was too
13 late, they had already sold upwards of 30,000 Hustle loans to
14 Fannie and Freddie as investment quality loans but they were
15 lemons.

16 That brings us to number four. Countrywide, the
17 defendants, they never told Fannie and Freddie about the bad
18 loans. So as I mentioned, the evidence will show that while
19 all this was going on, Countrywide did not tell Fannie and
20 Freddie what they were really up to. You'll hear that between
21 August of 2007 and March of 2008 Countrywide sold 30,000 Hustle
22 loans to Fannie and Freddie, each one with a promise that it
23 was investment quality loan. You'll also hear that more than
24 40 percent of those loans were not investment quality.

25 Now you'll hear testimony from Fannie, from witnesses

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Opening - Mr.Armand

1 from Fannie and Freddie, and none of them will testify that
2 they were told about the High-Speed Swim Lane or they knew
3 about the combination of risky lending practices that were so
4 troubling, like the fact they had benched the underwriters,
5 they were approving loans at such high speeds and paying
6 employees based solely on volume regardless of quality, and
7 that their own internal quality reviews were showing that
8 90 percent of the loans were high risk and 30 percent were
9 severely unsatisfactory. And the evidence will show that
10 Countrywide told Fannie and Freddie none of that. You also
11 won't hear that Countrywide reported the loans that they knew
12 were not investment quality to Fannie and Freddie. As I said,
13 they reported only six loans out of thousands.

14 Now you may be asking yourself: What does a bad,
15 defective loan look like? And we're going to talk about some
16 during the trial. And I can talk about an example that you'll
17 hear about now. This one was for a property in Fort
18 Lauderdale, Florida, where the borrower -- the loan file said
19 that the borrower earned \$13,000 a month as a doorman. And
20 this was a Hustle loan that was sold to Fannie Mae as an
21 investment quality loan. But some basic underwriting would
22 have found, looking on salary.com, that a doorman in that area
23 of the country wouldn't have been making more than about \$6,000
24 a month. And if they had done some basic underwriting in terms
25 of getting a verification of employment, they would have found

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Opening - Mr.Armand

1 that this actual the borrower only earned about \$5,000 a month.
2 So that is not an investment quality loan because the
3 borrower's income was so much lower than what it said in the
4 loan file that was sold to Fannie and Freddie. Well, in this
5 case, just to Fannie.

6 So that brings us to number five. Countrywide made
7 quick cash through the Hustle. So why did the defendants
8 engage in the scheme? The money. You'll hear that from
9 selling Hustle loans to Fannie and Freddie, Countrywide earned
10 revenues --

11 MR. SULLIVAN: Objection, your Honor, I believe the
12 Court ruled that out.

13 MR. ARMAND: These are --

14 THE COURT: Hold on.

15 No, I don't agree with the objection. Overruled.

16 MR. ARMAND: Countrywide earned about \$165 million
17 from selling Hustle loans to Fannie Mae and Freddie Mac.

18 Now as I talked about the Hustle and the loans, the
19 lemons that were created by the Hustle, I mentioned a number of
20 different percentages. But you don't have to worry right now
21 what they all signify, they're all measurements of the poor
22 quality of the Hustle loans. And one thing that will be clear
23 to you at the end of the trial is that no matter how you slice
24 it, the Hustle loans were bad, not investment quality.

25 So just to sum up the five points, the Hustle is about

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Opening - Mr.Armand

1 speed, volume, profit, not about quality. The defendants knew
2 from their own quality reports that the loans they were making
3 were bad loans, despite the poor quality. Number three, they
4 expanded the Hustle. Number four, they never told Fannie and
5 Freddie about it. And number five, Countrywide made profits.

6 So now that I have given you a preview of what the
7 evidence will show, I would like to tell you a little bit about
8 the kinds of evidence you will see.

9 First, you're going to see documents, and they will be
10 called exhibits during the trial. You'll see internal emails
11 from Countrywide where employees raised concerns about the
12 impact that the Hustle would have on loan quality. You'll see
13 the quality assurance reports I was just talking about showing
14 how month after month after month the problems with the loans
15 were getting worse.

16 (Continued on next page)
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D9o3ban5

Opening - Mr. Armand

1 MR. ARMAND: You'll also see internal e-mail to
2 Ms. Mairone where she was told that only a small percentage of
3 the loans that had been identified as having problems were
4 actually being corrected before the loans were closing and
5 being sold.

6 And the e-mails and other documents will show that
7 instead of stopping the High-Speed Swim Lane, they pushed for
8 more speed, more volume, more profit. And you'll see one
9 e-mail that says, and I quote, they wanted to make a hell of a
10 lot of loans.

11 You'll also hear testimony from witnesses. You'll
12 hear testimony from former Countrywide employees, who worked at
13 Full Spectrum Lending division, we'll explain the concerns that
14 they had about the quality, how they raised those concerns.

15 And you'll also hear from witnesses from Fannie Mae
16 and Freddie Mac who will talk to you about the representations
17 and warranties, the promises, and how they expected to be
18 buying investment quality loans and how they weren't told about
19 the Hustle.

20 So, in a nutshell, what the documents and the
21 testimony collectively will show is that the promise of quality
22 was largely a joke. That in the pursuit of profits, the
23 defendants, they benched the underwriters, they rushed
24 approvals, they removed controls, they ignored red flags, and
25 they withheld facts. When the defects began to show up in

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Opening - Mr. Armand

1 droves, they turned a blind eye, they kept Fannie and Freddie
2 in the dark, and they continued to sell them lemon loans.

3 That's fraud. That's why we're here.

4 Before I sit down, there are three things that we ask
5 you to do. First, to listen carefully to the witnesses when
6 they testify and pay close attention to the other evidence as
7 it comes in. The exhibits will come in or the evidence will
8 come in one exhibit at a time and the witnesses will testify
9 one at a time. But it may not always be in perfect
10 chronological order. We'll have an opportunity at the end of
11 the trial to tie everything up together in a closing argument.
12 But until that time, we just ask that you pay close attention
13 to the evidence as it comes in.

14 Secondly, please pay close attention to the judge's
15 instructions. At the end of the evidence before you
16 deliberate, the judge will give you detailed instructions on
17 what you're supposed to do, and we ask that you listen
18 carefully at that time.

19 And then third, we ask that you use your common sense.
20 The same common sense that you exercise in making important
21 decisions in your everyday lives. It's one of the most
22 important assets that you can bring to your service as a juror.

23 If you do those three things, at the end of the
24 evidence we'll stand before you again and request that you
25 return a verdict that's consistent with the evidence in this

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Opening - Mr. Armand

1 case, that the defendants are liable for fraud. Thank you.

2 THE COURT: Thank you very much. Now we'll hear from
3 counsel for the banks.

4 MR. SULLIVAN: No fraud. Two words. That's the heart
5 and soul and body of the defense. No fraud. And that's what
6 the evidence will show.

7 Now, I could sit down now and save us 39 minutes and
8 just let you think about that, but what lawyer can resist using
9 up all the time to tell you more about what the defense will
10 be.

11 My name is Brendan Sullivan. I'm going to speak for
12 the three corporate defendants that are on trial here. One
13 woman Rebecca Mairone, and three companies.

14 So let me talk about no fraud for a second. There are
15 lots of ways to say no fraud. No intent to deceive, no scheme
16 to defraud, no intent to misrepresent, no misrepresentation, no
17 violation of the mail fraud statute, which is a criminal
18 statute. No violation of the wire fraud statute, which is a
19 criminal statute. And of course no criminals.

20 So if there is no fraud, and I turn out to be right,
21 remember what the Court says, what lawyers say is not
22 important. You disregard everything I say if it doesn't match
23 the evidence from the witness stand and the documents. Just
24 forget it. But if the evidence doesn't match what they say,
25 then I trust you'll forget what they say.

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Opening - Mr. Sullivan

1 So if there is no fraud in this case, and I mean none,
2 what will the evidence show? It will show very decent, normal
3 people getting up in the morning, putting the kids out to
4 school, going to work, working in a mortgage application
5 business, where there are thousands of mortgages coming through
6 their offices. All of them bright people, doing a very
7 difficult and tedious job, each mortgage itself is said to be
8 more than 100 pages, picture it in a file.

9 Think about the data that would be in a mortgage file.
10 Of course, files are now on computers, but it is the same data.
11 This data about who the person is that's borrowing, about their
12 spouse, about their earnings history, about their credit, about
13 their background, about their prior mortgages, about their
14 payment histories. There is data in there about the property
15 they're buying. What is the property, where is it. Is it
16 appraised, is it valued. There is data about the loan that
17 they are going to take. What kind of loan is it? How much is
18 the interest? How long will it be? Literally hundreds of data
19 points that go into a loan.

20 These people, all these normal, well-intentioned
21 people that were involved in that business, you are going to
22 see many of them from the witness stand. I ask you to just ask
23 yourself each time you see a witness, hear a witness, ask the
24 question, what fraud? Where is the fraud? Because there will
25 be none. Normal, well-intentioned people working in the

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Opening - Mr. Sullivan

1 mortgage industry.

2 That's what the evidence will show. Not one moment
3 did any of them believe that they were deceiving Fannie Mae,
4 engaging in a scheme to defraud, and certainly not this
5 individual defendant Rebecca Mairone, who has been picked out
6 of hundreds of employees to sit with us in this court for the
7 next five weeks.

8 Let's talk quickly about who's here. First off is
9 Bank of America. I can't run my own TV but I am going to take
10 a chance. There it is. Bank of America. That's the
11 corporation that's here. Everybody knows, you go by five of
12 them on the way home. The company that's here is called Bank
13 of America N.A. BANA. The initials will drive you crazy in
14 this case. They speak in a language in the mortgage industry
15 that drives you nuts. I am going to do the best I can to use
16 English words, but even I can't do it all the time. BANA, Bank
17 of America. Employees, 167,000 employees, retail locations
18 5400.

19 Now, I said no fraud to begin with. Even the
20 government doesn't say that Bank of America committed fraud.
21 They don't say that. They're not arguing it. They're not
22 saying Bank of America was in a scheme to defraud. Bank of
23 America is here for the simple reason that they came along
24 after this so-called fraud, and bought Countrywide. I'll show
25 you dates in a minute. They came along afterward, after all

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Opening - Mr. Sullivan

1 the relevant facts here, and they bought the bank, of course in
2 good faith, merged it into itself, took in the employees, took
3 in their assets, and ran the mortgage business afterwards.

4 So, you'll never hear a word in this courtroom about
5 Bank of America being engaged in a fraud. I told you the
6 defense was no fraud. Bank of America, they're not even saying
7 there was a fraud.

8 More cast of characters here. Countrywide.
9 Countrywide was one of the biggest mortgage application or
10 producers in America. Just to give you an idea of the scope of
11 it, we'll just quickly look at it, 50,000 employees, almost 800
12 branches. This is, by the way, in 2007. You've got to back
13 with me in time. We are not talking about today. The problem
14 with litigation is it brings us all together to focus on the
15 past. Five and six years ago. That's what we're looking at.
16 Not yesterday, not last year. We are going back five and six
17 years to look at what happened at the time.

18 In 2007 alone, there were 2.1 million mortgages given
19 to home owners across America. 2.1 million. It shows you the
20 volume of mortgages that are going through various offices that
21 are worked on by normal, well-intended people. The total
22 amount is staggering. Who knows what amount that is.
23 \$385 billion worth of loans.

24 But the important thing is here we're not talking
25 about all that. We are talking about just this one division

D9o3ban5

Opening - Mr. Sullivan

1 over here, Full Spectrum Lending. That's what we are focusing
2 on six and seven years ago.

3 Let's look at Full Spectrum Lending. This is a
4 division of Countrywide. There is where we're focusing. It is
5 back to 2007.

6 Now, Rebecca Mairone was one of 4,000 employees. 94
7 branches, almost 200,000 loans that they pushed through their
8 system, 2007, to the extent of \$31 billion worth. That is the
9 size of the business that the government's been talking about
10 today.

11 Let's look at one more slide. This is a bit of a
12 corporate chart and it shows you where Rebecca worked. There
13 are all these people going to work. She worked up here. She
14 had bosses. She had people on the same stature virtually. She
15 was called chief operating officer. But what you'll find from
16 the evidence, ladies and gentlemen, is that this was a group of
17 people who worked together. They had work plans, they had
18 meetings, they worked to produce loans with the highest
19 possible quality. And when you see the documents and you hear
20 the witnesses, the focus on quality and correcting quality
21 problems is almost overwhelming from what was going on in those
22 days.

23 Now, it is also important, now these people are not
24 here. Fannie Mae you heard a little bit about that before.
25 This is the Federal National Mortgage Association called Fannie

D9o3ban5

Opening - Mr. Sullivan

1 Mae. Another initial, Fannie Mae, Freddie Mac, where they come
2 from, who knows. But that's what we call them. What is the
3 objective? This is the victim, says the government to you.
4 Fannie Mae and Freddie Mac bought loans that were processed
5 through Countrywide. They gut the loans. The government says
6 that they did not get the quality loans that they were
7 expecting.

8 Let's understand who Fannie Mae and Freddie Mac are.
9 Fannie Mae founded in 1938. It is a creature of Congress.
10 Congress passed it because their job in America is to provide
11 stability, liquidity, and affordability to America's housing
12 markets.

13 This is Freddie Mac. These are enormous companies.
14 5,000 people -- this is back in 1970. The Fannie Mae, 5,700
15 personnel in their offices. Their reason for being is to buy
16 mortgages. The phrase "born to ride" or something for
17 motorcycles, or "born to fly." These companies were born to
18 buy. That's what they did. They're created by the government,
19 they buy mortgages because of the crucial importance they play
20 in the housing market in America. If they weren't in
21 existence, there would be no money for anybody to buy
22 mortgages. That's what their function is.

23 They are the world's leading experts in the housing
24 market. And they had a relationship with Countrywide and they
25 know the market as well as anybody. They know what the risks

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Opening - Mr. Sullivan

1 are, they know what the procedures are, Fannie Mae has the
2 experience and Freddie Mac has the experience to understand
3 what is being produced by Countrywide and other companies that
4 are producing mortgages to them.

5 Now, you've heard a little bit about the mortgage
6 business. It is worth pausing just to get the basics. A home
7 owner wants to buy a house. He goes to Countrywide or some
8 other company or some other bank, that person then presents the
9 financial information, and the process starts at that time.
10 And it is a process that does take time. It takes a lot of
11 detail. And you have to build a file that contains accurate
12 information. Of course, they rely upon the borrower to tell
13 the truth. In fact, on all the forms the buyer has to sign
14 under penalties of perjury that they are telling the truth
15 about such things as income.

16 So you have a borrower, and you bring it to the
17 company, and the company then starts to build a file. Now,
18 once a file is built, it has to be a quality file. How do you
19 get a loan? Someone has to evaluate that loan. The term
20 "underwriter" will come up many times. What is an underwriter?
21 It is a little strange term. What it really means is, it is a
22 person who analyzes or evaluates an application for a loan or
23 part of an application, to make a judgment about quality.
24 That's the whole function of the mortgage process. People come
25 for loans, they present their data, it's put in a file, and

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Opening - Mr. Sullivan

1 someone makes a judgment is this a worthy borrower. That's
2 what Countrywide does. That's what their job was.

3 What is interesting to know in this day and age, you
4 wouldn't be surprised to find out, there are now automated
5 underwriters. In other words, years ago, if we were talking 20
6 years ago, 25 years ago, it would be human being that worked on
7 each application. They still have human beings working on it,
8 but they would make judgments. Now computer programs are so
9 sophisticated, you can take the data and put it into a machine.
10 This is called CLUES. Here's one of those initials that drive
11 you crazy, but I must say CLUES is easier to say than the real
12 name. The real name is Countrywide Loan Underwriting Expert
13 System. You are going to hear that 250 times at least. CLUES.
14 It means it is a computer program that acts as an underwriter.
15 In other words, it does the job of evaluating what data is in
16 there, so that it can determine whether this is a good loan or
17 not.

18 Let's quickly look what does it do. Automated
19 underwriting, and it has been around since 1993. The purpose
20 is to increase the production capacity and productivity of
21 Countrywide branches, to improve the consistency of
22 underwriting quality, reduce the cost of originating a loan.

23 So what happens here? You enter the data into the
24 computer, just I will go through these quickly. The computer
25 known as CLUES then analyzes the data. In other words, it

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1 underwrites it. Not a human underwriter, but a computer
2 underwriter. It looks at the credit, looks at the ability to
3 pay, looks at the property, and so forth. It analyzes it.
4 Then it make a decision.

5 There are two decisions CLUES can make. One is it can
6 accept the loan. In other words, it's been programmed to say,
7 okay, this is a borrower that's worthy, the loan is reasonable,
8 the prospect of paying it back is reasonable, so CLUES can
9 either accept or refer. "Refer" means send it to a human
10 being. Send it to an underwriter. These are just steps. Here
11 is this is a loan where it had an "accept." When there is an
12 accept, the machine will actually print out what conditions.
13 It will say, yes, this is a good loan, but make sure the
14 following is done, or check the following to make sure that
15 it's confirmed. If the machine says that it is not a good loan
16 or it can't fulfill all of its terms, it then puts a "refer."
17 So it can do an "accept" or a "refer." Refer means send it up.
18 All right. Now, that's called automated underwriting.

19 Now, you know how the mortgage industry works. After
20 the underwriting process is done, then the decision is made
21 about whether this is a worthy loan, and the borrower gets the
22 money, the borrower goes and buys the house. And what does
23 Countrywide do with that mortgage? Countrywide with that
24 mortgage, and the 200,000 other mortgages that you see, they
25 sell it. They can't hold it because they'll have no money for

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Opening - Mr. Sullivan

1 the next borrower. So they sell it to Fannie Mae and Freddie
2 Mac, the experts in the industry whose purpose it is to buy
3 loans. That's what Congress and all our government wants to
4 happen. They want a buyer of these loans, so there is a
5 continual funnel of money to borrowers, so borrowers can buy
6 homes.

7 We know some of the basics. What actually happened
8 here? What actually happened? The facts will show you that in
9 2007, subprime mortgages were no longer being written in the
10 industry. And the division we're talking about, Full Spectrum
11 Lending, was going to start working only with basically only
12 with prime mortgages. There is a big difference. Subprime
13 mortgages are all generally considered to be risky. As you
14 might imagine, the word prime mortgage is the top -- the top --
15 the cream so to speak. The better mortgages. The ones that
16 have less risk. The borrowers that are more likely to pay the
17 loan back in the long run.

18 So there was a dramatic change that occurred in this
19 division. And that was that they started to focus on dealing
20 with prime loans, whereas for years in the past they had been
21 dealing with subprime loans.

22 So what did management do? This required different
23 handling. With subprime loans, for example, human contact on
24 the loan file by underwriters was virtually mandatory. There
25 was so many difficulties with subprime loans that underwriters

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1 had to be analyzing each of those files. But with respect to
2 prime loans, that was not the case. Prime loans, it was
3 accepted in the industry, could be run through automated
4 process like we've just seen.

5 So, the people, all well-intended at Full Spectrum
6 Lending, devised a process that got to be known as the
7 High-Speed Swim Lane. They call it the HSSL, back to initials.
8 And naturally, letters like HSSL got turned into Hustle. Not a
9 bad word, the Hustle is a word you hear in every Little League
10 game, isn't it, with the coach saying get out there, Johnny,
11 get out there and hustle. You are going to hustle the Court
12 many times in the next few weeks, trying to beat traffic. The
13 word "hustle" was not a bad word, and neither was the concept
14 of High-Speed Swim Lane.

15 It was developed because this change in the product.
16 And there was a new design, and so people say could we have a
17 better program to move loans faster. Speedier because of our
18 different product. And the answer was yes. And all the
19 witnesses that will come to this witness stand will tell you
20 this was a good idea. What they basically were doing was
21 taking from this enormous river of loans, take the best ones
22 from the river, and put them up on a High-Speed Swim Lane so
23 they could be processed faster, so that they could be processed
24 with automated underwriting, so it would take less human
25 contact on the loan, and you would get an "accept" out of the

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1 computer program we've just looked at. Hustle. That was the
2 program.

3 People thought it was a great idea. It was a very
4 simple idea. Don't let this good prime loan be stuck in a pile
5 of other loans. Get the good ones out, put them on a
6 high-speed track, and move them through the system.

7 They'll all tell you they thought it was a good idea.
8 Rebecca Mairone didn't design this thing. There were people in
9 the company, many people, 20 people that would have input into
10 how to design this new process that would handle prime loans.
11 That's what this was about. No one thought misrepresentation
12 or fraud. No one.

13 When they had established a new program, let me --
14 rather complex in a way. They put this as a matter in their
15 policy books, you can actually see it. They have various
16 loans, and they had this in their policy book, straight through
17 at high speed. Loans that were deserving of going through at
18 high speed. They enter from here. They are not prime, they go
19 off somewhere else. It was a concept to design a program that
20 would work.

21 Were they concerned with quality? Every time the
22 evidence that you see a reference to a quality assurance
23 program or a quality control program, naturally, you'll see
24 that's a focus on maintaining quality. There were two things
25 you'll hear from the witnesses, and it will be interesting for

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1 you to understand what it is. Quality assurance looked at the
2 process itself. Think about this. It is an assembly line of
3 sorts. File comes in, it builds here, it builds there, it is
4 moved along in the chain and it has quality assurance. Quality
5 assurance looks at the steps along the way. Say it was an
6 automobile going along an assembly line. Looks at this stage.
7 It looks at this stage. If there is something wrong, it's
8 pointed out and it's fixed. If there is something wrong, it is
9 pointed out and it is fixed.

10 Quality control, a very different name. Quality
11 assurance looks at the process along the way, but quality
12 control is the final determination of whether it was a quality
13 product. They had both programs.

14 In the quality control, for example, in the fourth
15 quarter of 2007, they had a defect rate of 5.4 percent. In the
16 first quarter of 2008, they had a defect rate of 9.8 percent.
17 And in the second quarter of 2008, they had a defect rate of
18 4.4 percent. The figures you heard originally from the
19 government are quality assurance along the way. But the final
20 product was within industry averages.

21 In order to have a product at the end of the line,
22 which is a quality product, not a severely unsatisfactory
23 product, it requires a lot of effort by these same men and
24 women that are working there, to find the problems and correct
25 them.

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1 There was a process called "rebuttal" you'll hear
2 about. A rebuttal process. When there was a problem found
3 with the mortgages, people turned to, they looked at the
4 mortgage, and to see if they could fix it. Is there something
5 missing from the file. The fact that it is severely
6 unsatisfactory does not mean, as you'll see from the evidence,
7 that it can't be paid or the borrower is no good or the
8 property wasn't valued at the place. It might be that there
9 was a piece of paper missing from it. There was a crucial
10 piece of paper in the file.

11 So keep in mind, quality assurance is one thing.
12 Checks along the way. But the final quality control process
13 tells the story. Quality assurance is looking at the early
14 innings. What happened in the fourth inning, in the seventh
15 inning. But you know you don't take the score in the seventh
16 inning, you wait until the ninth.

17 Were people concerned about the quality? They
18 certainly were concerned about the quality. They took
19 extraordinary steps to make sure that the quality was at a
20 level which warranted its sale to Fannie Mae and Freddie Mac.
21 That's what they were doing. Not one of the people you see
22 from this witness stand, and there may be 20, 25 of them, will
23 say to you that they intended to deceive, to misrepresent, to
24 commit a fraud, or have any notion that someday, five and six
25 years later, that someone might come along and say, let's look

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1 back at this process and see whether this process somehow
2 facilitated a scheme to defraud.

3 It is important for you to know that there was a
4 extremely close relationship between Countrywide, the producer
5 of all these mortgages, and Fannie Mae and Freddie Mac. Those
6 expert, the buyers that were born to buy, they knew the
7 industry and what problems there were in the industry. They
8 knew the mortgages. They had their own quality system. They
9 talked frequently, they met frequently. Fannie Mae and Freddie
10 Mac did their own surveys on these mortgages. Fannie Mae and
11 Freddie Mac never complained about this process in 2007 and
12 2008.

13 But the interesting thing is that there were enough
14 quality concerns that these same people that the evidence will
15 show are decent, normal people, going to work, doing their job,
16 they decided to change the system themselves. They weren't
17 satisfied with their own quality ratings. And so they got
18 together as a group, in their company, and in accord with the
19 bulletin 08-195, on April 25, 2008, they changed the policy and
20 they brought underwriters, human underwriters back into the
21 process. Even though Fannie Mae and Freddie Mac were perfectly
22 satisfied to have automated processing of loans through CLUES.
23 Fannie and Freddie knew this business inside and out. They
24 knew CLUES as well as they knew their own automated processes.
25 You can't run a mortgage company without automated underwriting

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Opening - Mr. Sullivan

1 as part of the work.

2 But nonetheless, when the company found it was hard to
3 control the quality, even though their final quality scores
4 were within range, their defect rate was within the industry
5 range, they went and said, okay, let's do what we can to assure
6 quality by bringing humans back into the process and require
7 that they were there.

8 Let's take a look. By the way, see, I forgot
9 sometimes to tell you some things. This, which you cannot
10 possibly read, is the work flow, the steps that are taken to
11 process a mortgage. People in the company sit down and they
12 take it step by step by step, so they can tell their hundreds
13 of employees this is how you do it. This is what you do here
14 and this is what you do here. You'll see plenty of that.

15 Look at this bulletin I just mentioned. What happens
16 here? They're bringing underwriters back into the process.
17 All loans must be submitted to underwriting for a clear close
18 approval. Even though they had the CLUES, this amazing
19 computer that does the underwriting for prime loans, they
20 brought people back themselves.

21 About a month later on May 21, in bulletin 08-237,
22 they issued a further proclamation that basically said that all
23 loans are submitted to underwriting for initial cleared and
24 closed decision and approval.

25 That's the evidence. So concerned about quality they

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1 struggled with this process, they -- and by the way, in any
2 company you'll see that people have different views. Anybody
3 that's ever been to work somewhere knows that people have
4 different views about how to do the job, right? They have
5 underwriters who have one view of doing the job, supervisors
6 have another view of doing the job. But not one of them had in
7 their mind doing something to defraud anybody.

8 It is important you keep your eye on the timeline.
9 Let me show you this. I'm just going to hold this up. Look,
10 this is the High-Speed Swim Lane timeline. Couple of things.
11 It existed only for half of 2007 up to half of 2008. What is
12 important here? What did these people do when they developed
13 the High-Speed Swim Lane?

14 Look, start of the design, new work flow called the
15 High-Speed Swim Lane. They didn't just pull out of the air how
16 to have a new and better process. They studied it. There are
17 people that work at the company that actually do these things.
18 That know work process, know work flow.

19 The start of the High-Speed Swim Lane started in
20 August 13, 2007. What did they do? They had a pilot program.
21 Good thing for well-intended people. Is this going to work or
22 not? For 48 days, they had a pilot program to see how the new
23 system worked. It was done in two branches, in Chandler,
24 Arizona and Richardson, Texas. Once they saw that this program
25 was something that would be productive, they then put it into

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1 effect. And it ran from October 1st, until this date I just
2 told you about, when they issued a bulletin and said bring
3 human underwriters back into the process.

4 Now, the evidence will show you what steps they took
5 all along the way struggling to make this among the best
6 quality products they can. Some of them were listed here of
7 the efforts to assure quality. In December they added coaches.
8 They started an income reasonability test to determine, for
9 example, to take that issue of the doorman. Does the doorman
10 make 13,000. By the way, he probably does on undeclared tips.
11 They struggled on how to get accurate figures on stated income
12 loans. By the way, stated income loans are loans that are
13 throughout the industry well accepted, wanted by Fannie Mae and
14 Freddie Mac. Everybody knows the problem of stated loans and
15 how it's more difficult to assure accuracy in stated loans.

16 But look at the rest of the efforts to assure quality
17 here. Training on stated income. Reinstated a quality of
18 grade. Income calculator revised. Quadruple the number. They
19 themselves quadruple the numbers of audits to check their own
20 system. In February efforts to ensure quality. Training based
21 on quality assurance. Communication of quality assurance.
22 Back into March. Further things. Mandatory stated income
23 reasonability test, and then the process ends by their own
24 choice. No one came to the door and said we don't like your
25 products. No one came to the door and said you're cheating us,

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Opening - Mr. Sullivan

1 you are defrauding us, you're in a scheme to defraud us.

2 These are human, decent, normal, hard-working people,
3 many with different view, many who didn't like the system. But
4 it was the system.

5 She didn't put the system in. She was a person in the
6 company that was high enough up to try to encourage people to
7 follow the system. But to think that she did anything alone?
8 She didn't do one thing. You'll see the evidence.

9 THE COURT: Mr. Sullivan, you have five minutes left.

10 MR. SULLIVAN: Thank you. It is actually a little
11 interesting thing for you to focus on in the evidence. A case
12 about mortgages is not going to exactly be like TV or the great
13 classic movie "My Cousin Vinny" when we try to figure out what
14 crime was committed in the Sac-O-Suds restaurant.

15 There is a little interesting thing for you to focus
16 on. One of the government witnesses here who worked closely in
17 this process was a person that was involved in the every day
18 process. For example, he was involved in a process called
19 rebutting the severely unsatisfactory loans. Rebutting the
20 severely unsatisfactory loans. What that means is, if you've
21 got a severely unsatisfactory loan, look at it, figure out what
22 the problem is, fix it, and eliminate the severely
23 unsatisfactory status. That's what that's about. Their
24 witnesses were the ones that designed that program and provided
25 compensation for people to work night and day to undo severely

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Opening - Mr. Sullivan

1 unsatisfactory.

2 This particular gentleman, you'll see him, his name is
3 Ed O'Donnell. It's fascinating because he kind of lived one
4 life there, as one of those normal people coming to work and
5 doing the job, he decided to enter into a little bit of a
6 get-rich-quick scheme. He had read about the fact maybe as a
7 whistleblower he might collect some money by going back five or
8 six years and saying that, you know what, this is a fraud. He
9 didn't live it as a fraud, but when he decided to come here, go
10 to the government, and cash in to make some money under the
11 so-called whistleblower program, then he characterizes that
12 life five or six years ago very differently. You'll see him.
13 That's your job to evaluate the testimony. A lot of his
14 testimony is supportive of the defense, strangely enough.

15 But, a bottom line is that you've got two Countrywide
16 companies here that were not involved in a fraud, and you'll
17 see it from the evidence, and this woman never for a moment
18 thought that she was involved in a fraud. She didn't do
19 anything that her bosses didn't know about or her colleagues
20 didn't know about. And none of them thought that they were
21 engaged in wrongdoing. And the bottom line, you are going to
22 see from this evidence, that there was no fraud.

23 Thank you.

24 THE COURT: Thank you. And now we'll hear briefly
25 from counsel for Ms. Mairone.

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Opening - Mr. Mukasey

1 MR. MUKASEY: Ladies and gentlemen, this is Rebecca
2 Mairone. She's one of the decent and hard-working people that
3 Mr. Sullivan was just talking about.

4 Rebecca Mairone moved to California about seven years
5 ago to go work for Countrywide. She packed up two kids, and a
6 dog named Bear, and she went to start a job as a chief
7 operating officer in Countrywide's Full Spectrum Lending
8 Division.

9 As you heard, the business was changing, they needed
10 someone to help with the change. They chose Rebecca. And
11 Rebecca was a terrific choice. She wasn't from California,
12 she's not even from New York. Rebecca is a West Virginia girl.
13 She grew up in Charles Town, West Virginia. She had three
14 sisters. She ran track in high school, she played some
15 basketball.

16 The truth be told -- don't get angry at me -- she was
17 kind of a science nerd, and she grew up wanting to be an
18 engineer. And after all, an engineer, as some of you know, is
19 really a problem solver. And growing up in a small house with
20 three sisters, you better be somewhat of a problem solver.

21 And so, Rebecca paid her own way through college and
22 she worked during the day while she went to graduate school at
23 night, and she became an engineer.

24 Rebecca was a thinker, who focused on a problem,
25 gathered information from the people around her, and tried to

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Opening - Mr. Mukasey

1 achieve a solution that worked for everybody. And she always
2 did it by the book. And that's exactly what Countrywide's FSL
3 division needed seven years ago.

4 Now, Rebecca didn't really know anyone when she first
5 got to the FSL division. And truth be told, it was not the
6 most comfortable situation for her. She was joining a group of
7 guys that had worked together in the industry for years. And
8 she was an outsider, kind of a new kid, new girl on the block.
9 But there is no question that Rebecca was up to the challenge.

10 So every morning, Rebecca got up early, she went to
11 the office, she stayed late, in between she got dozens of phone
12 calls, hundreds of e-mails, she traveled on behalf of
13 Countrywide's FSL division about a week every month. She got
14 pulled in a thousand different directions every day. She
15 managed about 10 different projects at a time.

16 If she knew she had to jump on a plane somewhere or
17 she had to work until midnight one night, she would try to
18 sneak out of the office for an hour and take her daughter to
19 the Girl Scouts or watch her son at karate. Seven years ago,
20 that was a day in the life of Rebecca Mairone.

21 But the government, ladies and gentlemen, in this
22 case, wants you to believe that seven years ago, Rebecca
23 Mairone woke up every day and went to work to commit fraud.
24 Went to work with the intent to commit mail fraud and wire
25 fraud. Went to work every day specifically for the purpose of

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1 defrauding Fannie Mae and Freddie Mac.

2 Rebecca is fighting this case all by herself because
3 the allegations against her are false. They are fictitious,
4 they're fictional. They're based on government witnesses who
5 are rewriting history. Witnesses who said one thing about the
6 Swim Lane project seven years ago, and are saying a whole other
7 thing now. Witnesses who hold a grudge or maybe want something
8 and are taking out that grudge or trying to get that thing by
9 picking on an easy target. The outsider. The new girl on the
10 block.

11 But the government is not going to be able to prove
12 this case. Mr. Sullivan is right. There was no fraud.
13 Rebecca didn't get up and go to work every day to commit fraud.
14 She didn't intend to defraud anyone. She didn't intentionally
15 deceive anyone. She didn't hide anything from anyone. She
16 didn't participate in any scheme to defraud, because there was
17 no scheme to defraud. And the government unfortunately has it
18 dead wrong.

19 My name is Marc Mukasey. My colleagues over there
20 helping to work with Rebecca are Michael Hefter, Seth Cohen and
21 Ryan Philp, and together it is our privilege and our
22 responsibility to represent Rebecca in this case.

23 So I want to jump quickly into what Rebecca's
24 responsibilities were as a chief operating officer at FSL. She
25 was mainly responsible for figuring out how information flowed

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Opening - Mr. Mukasey

1 from one person to another, and how a loan got from a
2 salesperson at the beginning of the process to closing and
3 funding at the end of the process. They have a fancy corporate
4 name for it. They called it process design. But the judge
5 talked about speaking in simple English earlier. So, instead
6 of process design, you can think of Rebecca's responsibility as
7 making sure stuff gets done. That was her responsibility.

8 So when senior executives at Countrywide agreed on a
9 plan, Rebecca helped get it done. She helped it run smoothly.
10 She made sure all the necessary links were in the chain. And
11 if the chain got tangled up, she untangled the knot. She found
12 the solution.

13 There are a couple of other things she was responsible
14 for. She was responsible for technology at FSL, making sure
15 when you walk into your office in the morning, you turned on
16 your computer, you had the proper programs there, you had the
17 proper loan guidelines there.

18 She was responsible for recruiting and for staffing,
19 and she was responsible for hiring, training, and coaching
20 people who needed extra help.

21 All these responsibilities, by the way, meant, as any
22 of you who have worked in any business know, that sometimes
23 Rebecca had to make difficult choices. Sometimes she had to
24 make tough decisions. Sometimes people didn't agree with her.
25 But bottom line is they always knew where they stood with her,

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Opening - Mr. Mukasey

1 and she was always trying to be fair.

2 She worked with people in all levels of the company,
3 she worked with people above her, she worked with people below
4 her. She was a leader, but she was also a listener. She was a
5 strong person, but also a good teammate. She was a loud voice,
6 but also a member of a much, much larger chorus.

7 Now, what about Rebecca's role in the High-Speed Swim
8 Lane. Let's get a few things straight right off the bat.
9 Rebecca did not propose the High-Speed Swim Lane. Rebecca did
10 not design the High-Speed Swim Lane. Rebecca was not in charge
11 of the High-Speed Swim Lane. We're going to show you through
12 the proof that the idea to design a Swim Lane for prime loans
13 was made before Rebecca even got to FSL. And when she got
14 there, what she did was lend her expertise to the executives
15 that were working together on the project.

16 They all had good intentions, and Mr. Sullivan said it
17 correctly and I'll say it again. Everybody had the best of
18 intentions. They decided that customers who were good credit
19 risks would be served better if certain steps in the process
20 that were unnecessary or confusing or duplicative were removed
21 from the process and it was made simpler.

22 Rebecca and all her colleagues, including the
23 government's key witness, studied, they debated it, they tested
24 it, they believed in it, and they wanted to try it.

25 The proof will show that Rebecca's intentions were

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Opening - Mr. Mukasey

1 simple. Her intention was to work collaboratively with her
2 colleagues. Make sure that once senior management had decided
3 on a plan, make sure that the technology was in place, make
4 sure the computer programs were there, make sure people were
5 trained and staffed to do what they had to do.

6 So she led in some of these area, she followed others
7 in some of these areas, and she worked hand in hand with the
8 people on this chart every day.

9 Every day, for example, she spoke to her boss. He
10 supported the High-Speed Swim Lane. Every day she spoke to the
11 head of underwriting, she supported the High-Speed Swim Lane.
12 Every day she spoke to the head of credit quality and risk, he
13 supported the High-Speed Swim Lane.

14 Right from the get-go, the notion that Rebecca was
15 committing a fraud through the High-Speed Swim Lane is pretty
16 preposterous.

17 When the different people in management talked about
18 the High-Speed Swim Lane project, did everybody agree? No.
19 Were there people who voiced yeses and nos here and there? Of
20 course. That's professional debate. It's professional
21 disagreements. But there is one way you know it is not part of
22 a fraud. And that is it was all done out in the open.
23 Meetings, e-mails, telephone calls, conversations, you will
24 hear no evidence in this case that Rebecca went to any secret
25 meeting in the middle of the night in the dark alley, you will

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Opening - Mr. Mukasey

1 hear no evidence that Rebecca was up to some covert operation
2 in the shadows. Everything here was done in the sunlight.

3 By the way, in an organization of this size and this
4 complexity, even if Rebecca had wanted to do something that
5 nobody else wanted to do and everybody else was against, she
6 couldn't have done it. She just didn't have the authority to
7 do it.

8 It is important to remember that the High-Speed Swim
9 Lane was also not Rebecca's full-time focus. Right. She still
10 had the technology and the staffing and the training, and she
11 was also part of putting together what you are going to hear
12 referred to as the central fulfillment model. That's really
13 making sure the links in the chains were working together,
14 working in the proper order, for an efficient and a safe
15 process. Everything you are going to hear she did was the
16 opposite of somebody who wanted to sell bad loans to Fannie Mae
17 and Freddie Mac.

18 THE COURT: Mr. Mukasey, keep in mind you have three
19 minutes.

20 MR. MUKASEY: Three minutes. Thank you, Judge.

21 You may hear a little bit about a government e-mail --
22 an e-mail from the government that Rebecca sent. I want you to
23 make sure that the government tells you the whole story about
24 that e-mail. Keep in mind you, the government's going to try
25 to make it seem like Rebecca was trying to cover up issues

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Opening - Mr. Mukasey

1 about quality. I want you to know, I want you to remember,
2 that quality reports under Rebecca's direction went to every
3 member of senior management. That's not a cover up. That's
4 evidence not of fraud, but of good management.

5 Now, you're not going to hear a single witness in this
6 trial who says that Rebecca's goal was to commit fraud.
7 Rebecca, by the way, never even spoke to anyone at Fannie Mae
8 or Freddie Mac. Forget about defrauding them. You are not
9 going to hear from a single witness in this trial that Rebecca
10 ignored directions she got from her bosses. Not a single
11 witness who said Rebecca went off on her own, acted behind
12 people's back.

13 Let me suggest to you as you listen to testimony from
14 Mr. O'Donnell and a couple of the other government witnesses.
15 If you were disgruntled by the way you were handled at
16 Countrywide or Bank of America, who is easier to blame? Blame
17 it on the new girl. Blame it on the outsider. If you got
18 passed over for a job when Bank of America merged with
19 Countrywide, who is easier to blame than the new girl. If you
20 have sour grapes over your financial situation, who is easier
21 to blame than the outsider, the new girl. If you are looking
22 for a payout, well, might as well try to get it from the new
23 girl.

24 You are going to hear from Rebecca. Rebecca's got
25 nothing to hide. She is going to stand face to face against

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Opening - Mr. Mukasey

1 these government prosecutors and answer every question and tell
2 her side of the story.

3 Judge Rakoff mentioned earlier on about the glory and
4 the power of justice. That's in your hands right now. At the
5 end of this case, we are going to ask you to say loud and clear
6 with your verdict that Rebecca Mairone did not act, ever, with
7 bad intent, did not participate in any scheme. We'll ask you
8 to say the government is wrong, she's not responsible for any
9 fraud, because there was no fraud. Thank you.

10 THE COURT: Ladies and gentlemen, we're going to give
11 you a 15-minute break at this time. And we'll come back to
12 start with the first witness.

13 (Jury excused)

14 THE COURT: Please be seated. All right. I need one
15 lawyer from each party to come with me to the robing room so we
16 can call Mr. Boland and Mr. Price. Someone have their phone
17 numbers?

18 MS. SCHOENBERGER: I have Mr. Boland's phone number.

19 THE COURT: We'll start with him.

20 MS. SCHOENBERGER: To clarify with respect to
21 Mr. Price, we only had one brief conversation with him after he
22 left the bank and invited him to contact the government again
23 and he did not. We did not ask him to come to trial at that
24 time. So a call asking him why he's not at trial will come as
25 a surprise to him.

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1 THE COURT: Well, I guess a surprise is always a
2 wonderful thing. Let's go in the robing room.

3 (In the robing room)

4 THE COURT: I would prefer not to do this on record
5 because it will be a lot easier to talk with him if I don't put
6 him on the speakerphone. But if anyone has any objection,
7 we'll put it on the record.

8 MS. MAINIGI: I have no objection to that.

9 THE COURT: I was saying that I think it would be
10 better to do this off the record so I don't have to put either
11 of these people on the speakerphone. Defense counsel are in
12 agreement. Are you in agreement?

13 MS. SCHOENBERGER: Yes, of course.

14 THE COURT: Then we'll excuse our court reporter.

15 (Recess)

16 (Continued on next page)

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(In open court, jury not present)

THE COURT: So the record should reflect that in the presence of counsel I had a very nice telephone conversation with Mr. Boland and explained to him why it would be in everyone's interest, most particularly the jury's, for him to testify live. He said he would reconsider his position and wanted to talk about it with his wife, and he would let us know by a call to my chambers sometime this evening.

I also attempted to reach Mr. Price, but there was no answer and no voice mail at the number the government had for him. So the incredible pleasure of surprising him that I was looking forward to will have to wait for another occasion.

Now there was an issue that counsel for the back started to raise in the robing room, and I asked for her to put it on the record regarding the letter that was sent earlier today by the government, to the Court and counsel regarding Mr. Boland's deposition.

Just so the record is clear, after explaining that Mr. Boland had informed the government that he was not going to appear, the letter in the second paragraph states, quote:

In an abundance of caution, the government also brings to the Court's attention an apparent discrepancy between Mr. Boland's deposition testimony and a document identified on defendant's trial exhibit listed as DX 01155. The response to the question, "The application process didn't require you to

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1 divulge to Fannie Mae the nature of termination of your last
2 employment." Mr. Boland responded "Correct."

3 Boland transcript 186, line 18-21.

4 Exhibit DX 01155, which appears to be Mr. Boland's
5 employment application to Fannie Mae, including a field for
6 "reason for leaving position." Exhibit DX 01155 at 261279
7 attached, the government only recently learned of this document
8 and it was not shown to Mr. Boland during his deposition.

9 The government has not designated as evidence any of
10 Mr. Boland's testimony regarding his employment application to
11 Fannie Mae. That's the end of the paragraph.

12 Let me just look for one second at the relevant page
13 of the testimony 186. The full question really is by Mr. Cady,
14 "I take it then that the application process -- I think what
15 you're telling me, correct me if I'm wrong -- the application
16 process didn't require you to divulge to Fannie Mae the nature
17 of termination of your last employment." Answer, "Correct."

18 I note in passing that had there been an objection to
19 form, the Court would have sustained that objection to what
20 seems to me to be a very poorly-worded question, but there was
21 no such objection. And the exhibit has a field under the
22 general heading "work experience, reason for leaving position,"
23 and apparently the response was, "role and responsibilities."

24 Now I see no indication that this form required the
25 applicant to divulge to Fannie Mae the nature of termination of

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1 your last employment. There's nothing on the face of this
2 portion of the application that requires anything. There's an
3 apparent request for information. The answer that was given to
4 the question was "role and responsibilities." So it sounds to
5 me like pretty minor stuff, but let me hear from defense
6 counsel.

7 MS. MAINIGI: Thank you, your Honor. I think that
8 certainly there are a variety of inferences that could be drawn
9 from the combination of the deposition testimony as well as
10 this particular exhibit. The chronology is such that
11 Mr. Boland's deposition was taken in late May, he has provided
12 certain answers as it related to what he told his current
13 employer, Fannie Mae, as to the reasons why he left, why he
14 actually did leave. Subsequently we sought through subpoena
15 his employment file which contained part of --

16 THE COURT: When did you receive that?

17 MS. MAINIGI: We received that June 1st or 2nd, and I
18 believe the government was provided with a simultaneous copy by
19 Fannie Mae.

20 THE COURT: Wait a minute. If you received it on
21 June 1st or 2nd, then of course if you thought he had misstated
22 something in his deposition that needed further questioning,
23 you could have requested that from the Court.

24 MS. MAINIGI: Your Honor, we didn't feel that it
25 needed further questioning. He provided a response at his

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1 deposition. It was a deposition that the government chose to
2 take.

3 THE COURT: Wait a minute. My point is -- my question
4 is: What is your specific application?

5 MS. MAINIGI: The specific application, your Honor, is
6 obviously I don't know the sum and substance of the reasons why
7 Mr. Boland, in light of this information, chose to not come to
8 trial after indicating that he would come to trial, but all we
9 ask is that if in fact Mr. Boland makes a determination that he
10 is not coming to trial and there's nothing that could be done
11 to bring him here, that the Court consider an appropriate
12 remedy in that regard.

13 THE COURT: Remedy for what?

14 MS. MAINIGI: It would be to extent -- for example, if
15 Mr. Boland's deposition is played, it would be then for the
16 opportunity to get us -- to allow us to get in the employment
17 application of Fannie Mae. We were going to utilize that
18 document for impeachment of Mr. Boland.

19 Now the jury obviously would be able to draw their own
20 inferences as to whether they would then conclude that
21 Mr. Boland had been less than truthful in his deposition or in
22 his employment application or whichever, but it was the point
23 of it was that we gathered that document, we didn't know what
24 it was going to say when we saw it, the government got it at
25 the same time, and we were prepared to use it at trial.

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1 THE COURT: What do you say was his reason for leaving
2 the employment?

3 MS. MAINIGI: He was terminated, your Honor.

4 THE COURT: For what reason?

5 MS. MAINIGI: Breach of code of ethics, your Honor.

6 THE COURT: Breach of code of ethics in what respect?

7 MR. SULLIVAN: Do you mind if my colleague --

8 MR. CADY: Steve Cady.

9 Mr. Boland was terminated for breach of Bank of
10 America's code of ethics. The finding was by Bank of America's
11 internal investigation that he had lent apparently a user name
12 or password, either his own user name or password or sanctioned
13 the lending of someone else's user name and password to someone
14 who didn't rightfully own that.

15 THE COURT: So did you question him about that in his
16 deposition?

17 MR. CADY: I did question him, yes.

18 THE COURT: So that's been explored.

19 MR. CADY: That's been explored. So the reason why he
20 left Bank of America has been explored, but when I asked him at
21 his deposition whether he was asked by Fannie Mae why he left
22 Bank of America he said no.

23 THE COURT: If the question we're talking about is the
24 one that I just read, that's not what it says. What the
25 question was, I will read it again, "I take it then that the

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1 application process -- I think what you're telling me, but
2 correct me if I'm wrong -- the application process didn't
3 require you to divulge to Fannie Mae the nature of termination
4 of your last employment." Answer, "Correct."

5 Now I see nothing in this document which you've had
6 since June that shows that he was required to divulge anything
7 in regard to the nature of his termination, and I also don't
8 know why -- and this objection, of course, is preserved, even
9 though the objection to form is not -- I don't know that he is
10 in a position to have any knowledge admissible in evidence as
11 to what the Fannie Mae application process required.

12 So I would probably not allow this question even to be
13 read into evidence, this question and answer.

14 MS. MAINIGI: Your Honor, if I may return, I think in
15 our view it is potentially classic impeachment testimony.

16 THE COURT: Not if I don't let it in.

17 MS. MAINIGI: That is absolutely right. Obviously
18 those chips fall where they do in the height of testimony. But
19 the point is the government was also equally aware as of June
20 that Mr. Boland, perhaps in the eyes of some people, had been
21 less than truthful in his deposition testimony or his Fannie
22 application or both, and that that was something that could, in
23 the eyes of other people, bring his truthfulness as to other
24 matters into question.

25 THE COURT: I understand how all this might constitute

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1 Brady. Where is the obligation in a civil case for the
2 government to bring to your attention the fact that a document
3 that you already possess might have impeachment value with
4 respect to a deposition answer given in -- deposition that you
5 took?

6 MS. MAINIGI: Your Honor, I apologize, because that
7 certainly was not the import of what I was trying to explain.
8 We were aware -- we sent away for the document. We had some
9 concerns about his testimony after we took his deposition. We
10 then sent a subpoena for his employment application. When we
11 got the employment application, it was immediately apparent to
12 us that perhaps Mr. Boland had been less than truthful in some
13 way, shape or form. The government should have also arrived at
14 that conclusion. They chose not to correct his testimony.

15 THE COURT: I don't find that conclusion follows from
16 what I read, but let's assume arguendo for the moment, contrary
17 to any finding I am prepared to make at this moment, that
18 that's what it shows.

19 MS. MAINIGI: Arguendo, if that is what it shows, your
20 Honor, Mr. Boland was advertised to us -- was represented to us
21 by the government in their witness list and through
22 conversations as coming here live.

23 THE COURT: And when was that?

24 MS. MAINIGI: When they filed their witness list, your
25 Honor.

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1 THE COURT: Few weeks ago.

2 MS. MAINIGI: And their final joint pretrial, which
3 was provided last week.

4 THE COURT: So up until then, even though you had this
5 since June and had no idea whether Mr. Boland would be called
6 live by deposition since he was outside the territorial
7 jurisdiction of the Court, you did nothing.

8 MS. MAINIGI: Correct, your Honor. There was no
9 reason for us to do anything.

10 THE COURT: I will hear whatever else you want to say
11 on this at 5 o'clock. Let's bring in the jury and get the
12 witness on the stand.

13 MS. MAINIGI: Thank you, your Honor.

14 (Continued on next page)
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Thomas - direct

1 (Jury present)

2 THE COURT: Ladies and gentlemen, we're now ready to
3 begin the taking of testimony in this case. We're sorry for
4 that little extra delay, we had to take up a legal issue, but
5 that does not need to detain us any further.

6 Please call your first witness.

7 MR. CORDARO: The United States calls Michael Thomas,
8 your Honor.

9 MICHAEL THOMAS,

10 called as a witness by the Plaintiff,

11 having been duly sworn, testified as follows:

12 DIRECT EXAMINATION

13 BY MR. CORDARO:

14 DEPUTY CLERK: Please state your name and spell it for
15 the record.

16 THE WITNESS: Michael Thomas, M-I-C-H-A-E-L
17 T-H-O-M-A-S.

18 Q. Mr. Thomas, where do you live, sir?

19 A. In the Dallas, Texas area.

20 Q. Does anyone live with you in the Dallas, Texas area?

21 A. My wife and my three-year-old son.

22 Q. Please summarize your educational history, starting with
23 college.

24 A. Sure. I have a bachelor's degree in chemical engineering
25 from Georgia Tech that I received in 1997, and then a master's

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Thomas - direct

1 in business administration from UCLA in 2001.

2 Q. What is your occupation?

3 A. I'm a director of credit risk at Fannie Mae.

4 Q. Did you ever work at Countrywide Home Loans?

5 A. I did.

6 Q. When did you first become employed at Countrywide Home
7 Loans?

8 A. In 2001.

9 Q. Would you tell us the circumstances that led to your
10 employment at Countrywide?

11 A. Sure, I had just finished my MBA in mid 2001, tried to
12 start a little technology company, and then folded that after
13 we couldn't get investors, so then I found a job at
14 Countrywide.

15 Q. What position did you hold when you started at Countrywide?

16 A. Manager of global markets.

17 Q. Where were you based?

18 A. In Calabasas, California. I would spend half the time in
19 Dartmouth, England as well.

20 Q. What were your duties as manager of global markets at
21 Countrywide?

22 A. We had kind of back office operations in the UK, which
23 basically was processing underwriting and funding of loans for
24 banks in the United Kingdom. So I would go out and do process
25 improvement projects or analytics, staffing modeling, things

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Thomas - direct

1 like that for that business.

2 Q. Mr. Thomas, I want to ask you about a few of the terms you
3 used in the description. You referred to loans?

4 A. Yes.

5 Q. Could tell us if there is a specific type of loan that you
6 worked with?

7 A. Mortgage loans.

8 Q. What is a mortgage loan?

9 A. A mortgage loan is basically when a customer wants to buy a
10 house they'll ask for funds from a bank or a mortgage lender.
11 The bank or mortgage lender will provide the funds to buy the
12 house in exchange for monthly payments plus interest.

13 Q. And how does someone get a mortgage?

14 A. So you could go into a bank or call the mortgage lender,
15 now you can do it online, but eventually you get to a loan
16 officer that takes an application.

17 Q. In your experience, does the bank simply hand over the
18 money without any process?

19 A. No, they have to assess the risk of the loan.

20 Q. And is there a name given to the process of assessing the
21 risk of the loan?

22 A. Sure, underwriting is typically what we call it.

23 Q. You referred to underwriting as part of your job
24 description as a manager of global markets, is that correct?

25 A. Yes.

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Thomas - direct

1 Q. And what interaction did you have with underwriting in that
2 position?

3 A. It would depend on the project we were working on, but
4 basically I would -- underwriting or any of the other
5 functions, we would interview the individuals doing the role
6 and we were either looking for certain controls or looking for
7 process improvement areas depending on what the project was.

8 Q. At the time you were employed by Countrywide, were you
9 familiar with the underwriting process that Countrywide used
10 for certain loans?

11 A. At the time when I first started Countrywide, no, I had no
12 mortgage experience when I started.

13 Q. And you testified that underwriting pertains to risk?

14 A. Yes.

15 Q. Could you just explain what the term "risk" means?

16 A. Sure. So basically you're trying to determine -- basically
17 I think of two types of risk, the borrower's risk or their
18 ability to pay the loan, and the risk of the property itself,
19 is it -- would it be a riskier property to sell, is it rural
20 property or is it something that would be in high demand? So
21 you kind of assess both layers of risk.

22 Q. Are some mortgages riskier than others to the bank?

23 A. Yes. Both borrowers would have different types of risk and
24 then properties would have different types of risk as well.

25 Q. Please explain to us what you mean by borrowers had

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Thomas - direct

1 different types of risk.

2 A. So a borrower could have a different credit score, a high
3 credit score versus a low credit score. And typically your
4 credit score reflects your previous payment history, so on
5 other debt that you had, if you made your payments consistently
6 you would have a higher credit score. The underwriter would
7 also look if you had a mortgage previously, they would look
8 have you made the mortgage payments on the previous mortgage on
9 time, things like that. Income level also, they would assess
10 income level. Steady job history, that kind of thing.

11 Q. I believe you referred to property, that has risk as well,
12 correct?

13 A. Yes.

14 Q. Could you explain to us what that means?

15 A. Sure. So different properties would have different levels
16 of risk, meaning some properties are a lot more desirable and
17 easier to sell if the bank had to sell than if the property was
18 rural or very unique, that might be more difficult, more high
19 risk loan.

20 Q. Mr. Thomas, why do banks make mortgages, in your
21 experience?

22 A. To make money on the interest.

23 Q. What do you mean by "interest?"

24 A. So the borrower would pay back -- in the monthly payments
25 would pay back part of the loan amount and part would be

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Thomas - direct

1 interest to the bank.

2 Q. In your experience, does the mortgage lender charge every
3 borrower the same rate of interest?

4 A. No, it depends on the risk.

5 Q. Could you explain that to us, please.

6 A. Sure. It would depend on let's say a good borrower would
7 have a prime loan, what we called a "prime loan," which may
8 have a lower interest rate. Subprime loans may have a higher
9 interest rate. And it also depended on what type of loan the
10 borrower would receive, too. There's different 30-year loan,
11 you could get a 15-year loan, different fixed rate or
12 adjustable rate kind of thing.

13 Q. Let's get back to your work history at Countrywide. How
14 long were the manager of global markets?

15 A. For a little over a year.

16 Q. What was your next position?

17 A. I moved over as vice president of central services in the
18 Full Spectrum Lending division of Countrywide.

19 Q. Would you explain to us what the Full Spectrum Lending
20 division at Countrywide was?

21 A. Sure. There were three main lending divisions in
22 Countrywide, Consumer Markets Division, which we called CMD,
23 Full Spectrum Lending, which we called FSL, and the Wholesale
24 Lending Division, which we called WLD. And Full Spectrum
25 Lending -- Consumer Markets Division there was kind of the

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Thomas - direct

1 bigger division in Countrywide, and they had a lot of builder
2 relationships. So if you went out and bought a house, you
3 might end up at CMD division. Full Spectrum Lending dealt a
4 lot with people who wanted to refinance their mortgage, so they
5 needed to pay off the old mortgage, get a new mortgage and take
6 some of that money back. And they did subprime loans
7 originally. So that's kind of how they got the name Full
8 Spectrum Lending, they served the full spectrum of borrowers.

9 Q. If you haven't told us, when you obtain the position of
10 vice president?

11 A. February 2003, I believe.

12 Q. You said February 2003?

13 A. Yes.

14 Q. What were your duties as vice president of central service
15 analytics?

16 A. So in that role I supported the underwriting and funding
17 divisions of Full Spectrum. So we had centralized underwriting
18 and centralized funding, and so I did a lot of reports,
19 analytics, staff modeling again, productivity reports, things
20 like that.

21 Q. What was your next position?

22 A. So that position kind of grew and matured over time. We
23 had developed a more robust reporting platform, things like
24 that. I grew out a team of individuals there. And then in
25 2005 I left Countrywide and joined Washington Mutual.

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Thomas - direct

1 Q. Why did you leave Countrywide?

2 A. I had a very long commute. I was commuting two and a half
3 hours each way every day. I had just gotten married. So that
4 was a little stressful for the first year and a half of our
5 marriage. Washington Mutual had an office like five minutes
6 from the house, so that's why I went there.

7 Q. What were your duties at Washington mutual?

8 A. So there I came on as a project manager. Washington Mutual
9 had kind of grown significantly through buying other banks and
10 mortgage lenders. So they had a lot of different systems that
11 they processed and originated loans on. So they had a lot of
12 projects to kind of get everything onto one system, and my
13 project was to optimize that system after it was all done.

14 Q. I should ask you, what is Washington Mutual?

15 A. Washington Mutual is another bank.

16 Q. How long did you remain at Washington Mutual?

17 A. About five months.

18 Q. What happened next?

19 A. So basically I determined that it was going to be extremely
20 costly and time consuming to do what they wanted to do in that
21 project, so I kind of wrote myself out of a job there. So
22 things got very slow, and I emailed my old boss Jim Key at
23 Countrywide and Ed O'Donnell as well and said do you have
24 anything going on over there. So they suggested if I wanted to
25 come back I could come back to Countrywide.

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Thomas - direct

1 Q. You mentioned a couple of names. Could you tell the jury
2 who Jim Key was?

3 A. Sure. He was -- at the time when I left first left to
4 Washington Mutual, he was my boss. He was also Ed O'Donnell's
5 boss and Cheri Shine's boss, and he did kind of central
6 services support basically.

7 Q. Do you remember what position Mr. Key held?

8 A. I don't remember his title off the top of my head.

9 Q. Did he work at FSL?

10 A. He did, yes.

11 Q. And you mentioned Ed O'Donnell.

12 A. Yes.

13 Q. What was your relationship to Mr. O'Donnell prior to your
14 departure to Washington Mutual?

15 A. Sure. Ed O'Donnell ran the central underwriting function,
16 so I supported him, and a lot of my reports and things like
17 that would support Ed.

18 Q. You testified that you had some communication with
19 Mr. O'Donnell and Mr. Key. Would you explain to us the nature
20 of that communication?

21 A. Sure. I think I sent him an email that said, you know, do
22 you have any spreadsheets for me to work on, or something like
23 that, and I got a note back pretty quickly saying: Are you
24 interested in coming back to Countrywide? And then I think it
25 was within a week or two I got an interview with Cliff

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Thomas - direct

1 Kitashima, who was the chief credit officer, who I then
2 worked -- basically that is who Jim Key and Ed O'Donnell and
3 Cheri Shine and everybody reported up to, the chief credit
4 officer. So I talked to Cliff about coming back.

5 Q. You mentioned Cheri Shine a couple of times. Who is
6 Ms. Shine?

7 A. She ran the centralized funding organization at the time.

8 Q. Can you explain to us what the centralized funding
9 organization was?

10 A. Sure. So after the underwriter assessed the risks and
11 everything and basically the loan is ready to go, the
12 centralized funding organization, the funders would basically
13 get the money ready to wire to the customer, make sure the
14 title, everything is -- all the compliance things, everything
15 is signed appropriately, that kind of thin.

16 Q. Was centralized funding part of the FSL or some other
17 division of the company?

18 A. Part of FSL.

19 Q. Did Countrywide ultimately rehire you?

20 A. Yes.

21 Q. When did that happen?

22 A. I believe it was kind of end of 2005.

23 Q. And what happened to your commute?

24 A. So I decided when I came back that I eventually would
25 relocate to one of Countrywide's other locations, primary

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Thomas - direct

1 locations, which is either Texas or Arizona. And while I
2 considered that, we had an insurance office in Irvine, which is
3 where my house was, so they let me work out of that office
4 until I decided where to move.

5 Q. Sorry if I missed it, did you tell us where you actually
6 moved to?

7 A. I ended up choosing Texas.

8 Q. What position did you hold in Texas?

9 A. So it was first vice president, central services, and I
10 think eventually changed it to risk management.

11 Q. Was this a position within FSL?

12 A. Yes.

13 Q. What were your job responsibilities?

14 A. It was very similar stuff. When I first started back I
15 reported to Cheri Shine, who ran the funding organization. I
16 still supported both Cheri and Ed's operations, so both
17 underwriting and funding. I did a lot of reports, analytics,
18 staff modeling. I had a process improvement team as well, did
19 a lot of quality reports, things like that.

20 Q. You talked about supporting Cheri Shine and Ed O'Donnell's
21 operations. Could you explain to us what you mean by "those
22 operations?"

23 A. Sure. So as head of centralized funding, Cheri would
24 have -- we had three main centers where we had a lot of funders
25 and compliance specialists that worked in the funding

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Thomas - direct

1 organization, and so I supported that organization. And then
2 Ed O'Donnell's organization had a lot of underwriters in the
3 same locations, but that was basically the centralized
4 underwriting funding groups.

5 Q. How long were you in the position of first vice president
6 of risk management?

7 A. I stayed in that position -- I got a promotion along the
8 way. I stayed in that position up until I left. It was Bank
9 of America in 2009.

10 Q. Could you explain to us why you started or you were rehired
11 into Countrywide and then left Bank of America?

12 A. Sure. So around 2008 when Bank of America took over there
13 was a lot of reorganization, transition teams, people trying to
14 find places in the new organization. And as that process
15 unfolded, I wanted to make sure my employees all found jobs in
16 the new organization, so I basically found them all jobs. And
17 then basically I was looking to see if there was a spot in the
18 new organization for my role or whether I would take a
19 severance package and leave.

20 Q. And which choice did you make?

21 A. I took a severance package.

22 Q. You said in that explanation that Bank of America took
23 over, and I will ask you to explain what you mean by that.

24 A. So they acquired Countrywide in 2008.

25 Q. What happened after you took the severance package?

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Thomas - direct

1 A. So that's when my wife got pregnant, and in that time we
2 were trying to start a family, so we took some time off. And
3 then about the time my severance package was up, I got a call
4 from the first person that hired me into Countrywide asking if
5 I wanted to come back.

6 Q. Do you recall the time period in which you received that
7 call?

8 A. That would have been mid 2010.

9 Q. Do you recall who contacted you?

10 A. Yes, David Swain.

11 Q. Who is Mr. Swain?

12 A. So David -- at this point he was working in the loan
13 modification side, the servicing side of Countrywide. When I
14 previously had worked for him he was part the FSL in the past,
15 and actually global markets, he hired me in the management of
16 global markets as well.

17 Q. Could you explain what you mean by loan modification?

18 A. Sure. So if a borrower can't -- misses some payments, and
19 let's say that they miss three payments in a row, the bank will
20 try to find a way to modify that loan, so either change the
21 interest rate terms or maybe forgive what they haven't paid and
22 move it to the back end of the loan, something like that to get
23 the borrower back on track paying the mortgage. So that's
24 called a modification.

25 Q. What was your position at Bank of America?

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1 A. So I again did a lot of capacity planning. It was really
2 more focused on capacity planning in that role. As you can
3 imagine, there was a lot of modification volume at the time in
4 2010. And so we had about 2,500 employees, and I was trying to
5 forecast the volume, try to predict how much volume was going
6 to need to go through the process and how many people it would
7 take to do that. So by the end -- kind of at the peak we had
8 about 10,000 employees, so I was trying to figure out how many
9 people we needed and when, and also where to put the people in
10 office space in locations throughout the country.

11 Q. Could you explain what you mean by volume through the
12 process? What are you referring to there?

13 A. Basically customers that needed a modification.

14 Q. Did your position at Bank of America have a title?

15 A. I believe it was senior vice president, loan modification,
16 capacity planning or something like that.

17 Q. How long did you hold that position?

18 A. For a little over a year.

19 Q. What was your next position?

20 A. Then I joined Fannie Mae as director of credit risk.

21 Q. Did you leave Bank of America voluntarily?

22 A. Yes.

23 Q. Are you still employed at Fannie Mae?

24 A. Yes.

25 Q. What is your position?

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1 A. The same position, director of credit risk.

2 Q. Could you describe your job duties in that position?

3 A. Sure. So we have a team called credit portfolio risk. And
4 so Fannie Mae is basically an investor where they buy loans
5 from mortgage lenders and other banks. And so when you have
6 all those loans, it's called your portfolio. So my role again
7 does a lot of reporting and analytics around assessing the risk
8 of the overall portfolio.

9 Q. What were the circumstances that led you to depart Bank of
10 America and then ultimately take employment with Fannie Mae?

11 A. I had gotten a call from Ed O'Donnell, who I worked with
12 significantly at Full Spectrum and for period of time I worked
13 with him, and told him if he ever had any job openings that I
14 would definitely be interested in what he had. So he was
15 building out a group there that -- credit portfolio risk was a
16 fairly new group, and he was building out his group, so he
17 wanted to see if I was interested in interviewing.

18 Q. Did you interview with anyone at Fannie Mae?

19 A. Yeah, I met with Ed first, then I met with two of his
20 directors, Lena Vann and Paul Marcolongo. And then ultimately,
21 I had to interview with Ed's boss, Gwen Muse-Evans.

22 Q. Mr. Thomas, why don't we talk briefly about Fannie Mae.
23 Could you explain to us what Fannie Mae is?

24 A. Sure. It's a government-sponsored enterprise, which is
25 basically it had a charter from Congress that was essentially

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1 to provide funding to banks, mortgage lenders, so they could
2 continue to make loans. If a bank had to make loans on its
3 own, they have a limited amount of money to do that, so
4 essentially they won't be able to make more loans. So Fannie
5 and Freddie, another similar company, they basically buy loans
6 from the banks and the mortgage lenders, give the banks money
7 for that loan, and they can go make more loans. So we call it
8 providing liquidity in the market.

9 Q. Do Fannie Mae and Freddie Mac have any relationship with
10 each other?

11 A. They're similar but separate companies. Same charter from
12 Congress.

13 Q. While you were employed at FSL, did Fannie Mae and Freddie
14 Mac purchase loans from Countrywide?

15 A. Yes.

16 Q. Now if we can, I would like take a few minutes to talk
17 about Countrywide. What was Countrywide?

18 A. Countrywide was a mortgage lender started by Angelo Mozilo
19 in Pasadena, California as a small company and grew to the
20 biggest mortgage lender in the country.

21 Q. And how did Countrywide get to be one of the biggest
22 mortgage lenders in the country?

23 A. By making the most loans, more loans than anybody else. I
24 don't how they did it better than the others, but --

25 Q. Did they sell loans too?

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1 A. Yes, they did.

2 Q. Now were some of these loans mortgages?

3 A. Yes, it was a mortgage lender, so they were all mortgages.
4 They were a little different than a regular bank would have
5 credit cards and other things, and Countrywide was just
6 mortgages.

7 Q. Could you explain -- while you were at FSL, could you
8 explain the process whereby Countrywide made a mortgage?

9 A. Sure. So once the borrower submitted an application or
10 went to a loan officer and submitted an application, or maybe
11 over the phone, then what we call a processor or loan
12 specialist would work with the borrower to collect all the
13 necessary documentation, so pay stubs, sometimes tax returns,
14 all those kinds of things. So the processor would put -- what
15 we call build the file, so they would build the file and get it
16 ready for submission to underwriting. And then an underwriter
17 would look at that information and kind of assess -- like we
18 said, assess the risk of the loan. And once they were
19 comfortable with it, approved it, everything was done, then the
20 funders would provide the money to the borrower.

21 Q. Were all loans in Countrywide originated by -- did they all
22 have the same quality level?

23 A. No.

24 Q. Could you explain the distinction in quality?

25 A. Sure. Again, borrowers and properties have different

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1 valuations, so a lot of times we had prime loans, which was
2 like a prime borrower, good credit history. And subprime was
3 somebody who maybe missed payments in the past, had a
4 bankruptcy or something in the past, and so those loans are --
5 the lower quality would be called subprime.

6 Q. Did Countrywide ever sell subprime loans?

7 A. Yes.

8 Q. And while you were employed at FSL, did that change at any
9 point?

10 A. Yeah, when I started with Full Spectrum 2003 they were
11 already kind of migrating more towards prime. Full Spectrum
12 was originally more of a subprime lender, but they started
13 doing more prime loans. So that trend kind of continued
14 through until they were doing majority of prime loans kind of
15 2006, '7-ish.

16 Q. Was FSL part of that emphasis on prime loans?

17 A. Yeah. That's where the shift primarily occurred, because
18 the other divisions didn't really do much subprime.

19 Q. Now you mentioned that Countrywide sold loans during 2007
20 and 2008 time period. Who bought the loans?

21 A. So primarily Fannie Mae and Freddie Mac would buy loans.
22 Also other banks would be loans. So it varied, sometimes
23 Countrywide would even buy loans.

24 Q. Could Countrywide sell Fannie Mae and Freddie Mac any kinds
25 of loans that it wanted?

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1 A. No, they had to be of a certain quality, so typically we
2 call that bucket of loans conforming, so they conformed to the
3 guidelines or the requirements of Fannie Mae and Freddie Mac.
4 Then there were other products as well that were kind of
5 specialized. Fannie Mae, for example, had an expanded approval
6 loan, which was kind of in between prime and subprime, but it
7 was a loan product specific to them that we could also sell to
8 them.

9 Q. Now did Fannie Mae and Freddie Mac underwrite every loan
10 that it purchased or that they purchased from Countrywide?

11 A. No, no.

12 Q. Why not?

13 A. Fannie and Freddie wouldn't have the capacity to underwrite
14 every loan, so they relied on the banks and the mortgage
15 lenders to do the underwriting of the lobbies.

16 Q. When you say they wouldn't have the capacity --

17 A. The volume of loans is huge. Fannie Mae has over 12
18 million loans I think right now, so it's a huge portfolio. So
19 they had to rely on the lenders themselves to do the
20 underwriting and guarantee the quality that they delivered.

21 Q. And if you were aware, did that guarantee have a name?

22 A. Yeah, we typically call it rep and warrant, or
23 representations and warranties, which means that we represent
24 and warranty that the loan is of the sufficient quality to be
25 sold to them.

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1 Q. Are you aware if Countrywide made representations and
2 warranties to Fannie Mae and Freddie Mac in connection with the
3 sale of loans?

4 A. It's a requirement to sell loans.

5 Q. At the time you were employed at FSL but prior to the
6 advent of the High-Speed Swim Lane I would like you to go
7 through the various stages of the loan origination process.
8 And you touched on it already, but I wanted you take us through
9 that.

10 A. Sure. As I mentioned, the processor kind of builds the
11 loan file. And I should probably mention that there's a tool
12 that they could use as well called CLUES. It was an automated
13 underwriting system is what we called it. So they would input
14 information into CLUES, and that was part of the package that
15 they had to get ready for underwriting. So they would submit
16 that to underwriting, underwriting would assess the risk and
17 make sure everything was ready, which we called "cleared to
18 close," and then that meant it was ready for the funder to
19 close the loan, provide the funds to the borrower.

20 Q. Let's talk for a bit about CLUES, please.

21 A. Sure.

22 Q. Prior to the High-Speed Swim Lane, could you explain what
23 CLUES was or is?

24 A. Sure. So CLUES is basically a set of business rules that
25 an underwriter would normally go through in assessing whether

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1 the parameters of the borrower and the property fit the
2 guidelines of a particular product. So CLUES basically would
3 use the information that you would put into the system, run
4 through those rules, and say it's an accept, which means it's
5 acceptable, it's a refer, which means you need to refer it to
6 an underwriter for a manual underwriting, or it would not have
7 enough information to make a decision.

8 Q. Mr. Thomas, is CLUES a human being with a funny name?

9 A. No, it's Countrywide Loan Underwriting Expert System.

10 Q. What kind of system is that?

11 A. It's just a database basically with rules, so again you put
12 in information and it would run through the scenarios and
13 basically come up with a decision.

14 Q. Now was it common in the mortgage industry for lenders to
15 use equipment like CLUES?

16 A. Yes, that was very common. Everybody had their own
17 systems, and Fannie Mae even had their own system called
18 Desktop Underwriter that you would use for their loans. But
19 essentially it would say: Does it fit guidelines? And then it
20 will tell you all the things that you needed to have in that
21 file for it to be officially approved. So "accept" meant that
22 it was conditionally approved. So it would provide conditions
23 that would say like if you said the borrower made \$50,000 a
24 year, you would have to have some documentation to support
25 that, and that's how a condition would be cleared.

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1 Q. Mr. Thomas, generally speaking, is there a generic name for
2 a system like CLUES?

3 A. Automated underwriting system.

4 Q. Now at FSL, prior to the High-Speed Swim Lane, did CLUES --
5 the use of CLUES mean there was no underwriter associated with
6 the origination of the mortgage?

7 A. No. So an underwriter would always make the decision and
8 clear the conditions, and basically what we called cleared to
9 the close, which means they made the decision and they cleared
10 all the conditions that CLUES would initiate or print out on
11 the report, and that's when it was officially approved.

12 Q. Did CLUES clear those conditions?

13 A. No.

14 Q. Could you explain to us what you mean by "conditions?"

15 A. Sure. Good example is the pay stubs. You have to have a
16 certain number of pay stubs to support the income that was put
17 into CLUES, otherwise you could put anything into the system
18 you wanted to, but you had to have some documentation to
19 support it. So there would be conditions around title,
20 appraisal, lots of different things depending on the program
21 and depending on the information that you put in.

22 Q. Then if CLUES indicated certain conditions, prior to the
23 High-Speed Swim Lane, what would happen next in the process?

24 A. So when the processor would get the required documentation,
25 if it was a documentation kind of condition, so processors

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1 would get the borrower to send in the documents but the
2 underwriter would review the documents, or whatever the
3 condition was, and they would clear it. In the old days it was
4 kind of checking off the actual report and initialing that they
5 cleared the condition.

6 Q. And who had the ultimate responsibility for ensuring all
7 the conditions were cleared?

8 A. The underwriter.

9 THE COURT: All right. Counsel, I think this probably
10 a good place to break for today.

11 So ladies and gentlemen, we're off to a good start,
12 but we want to have a full day tomorrow, so of course we're
13 starting at 9:30. But please all be in the jury room at 9:30,
14 and then we'll start promptly. We can't start, obviously,
15 until you're all here. And tomorrow, we will go to 5 o'clock.
16 There will be later days this week when we'll only go to 4, but
17 tomorrow we'll go to 5.

18 So have a great evening, and I'll see you tomorrow.

19 (Continued on next page)
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1 (Jury not present)

2 THE COURT: Please be seated.

3 Mr. Thomas, you can step down, we'll see you tomorrow
4 morning at 9:30.

5 Is there anything further that counsel wanted to
6 raise?

7 MR. HEFTER: Your Honor, I think there is one other
8 issue on Mr. Boland's testimony, and that is with respect to
9 the designation itself. So I will start off by saying in the
10 event that Mr. Boland calls chambers back and says he's coming
11 to New York, my comment is moot. But if he's not, and given
12 the videotape issue, I wanted to raise the issue with the
13 designations for you.

14 I believe the government has submitted now to you
15 designations for Mr. Boland. They have not designated
16 testimony relating to his termination from Bank of America. We
17 believe that it's appropriate to have that counter designated.
18 I believe they're taking the position that because they are not
19 designating that portion of the testimony, we're not entitled
20 to counter designate as to his termination, which I do believe,
21 from Bank of America, one of the defendants in the case, I
22 think does go to his credibility and his motivation and
23 testimony.

24 THE COURT: Yeah, that's a separate question from
25 whether he gave perjured testimony or anything like that. What

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1 you're saying is the testimony he did give you believe has --
2 is evidence that could be used as impeachment evidence.

3 MR. HEFTER: Correct, your Honor.

4 THE COURT: So go ahead and designate that. If there
5 are objections from the government I will deal with them as
6 well.

7 MR. HEFTER: Fair enough.

8 MR. CORDARO: Your Honor, just one other housekeeping
9 matter. I know counsel made an application to the Court
10 concerning Mr. Boland, and I think the application involved the
11 application or the résumé. I don't know if the Court was
12 reserving on that at this point.

13 THE COURT: That's why I asked whether there was
14 anything further.

15 MS. MAINIGI: Your Honor, on that point, I think all
16 we're simply looking for, if Mr. Boland does not come live, is
17 a stipulation to what the document says. But we were expecting
18 he would come live and expecting to cross-examine him on it, so
19 we were essentially looking for a stipulation to what the
20 document says. Anyone can draw whatever inference they choose.

21 THE COURT: I don't have the power to force a
22 stipulation on anyone. If the government wants to stipulate to
23 something with you, that's fine. If they don't, and you feel
24 that you have a basis for getting it before the jury, I will
25 deal with that then. I remain of the view, based on the

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1 arguments so far made, that the document does not constitute
2 material impeachment of anything he said in the question and
3 answer that was referred to. I also remain of the view that
4 that question and answer could not come into evidence anyway
5 because it calls for speculation on his part about matters as
6 to which no foundation has been made as to his knowledge and
7 which is extremely unlikely he would have knowledge, along with
8 other difficulties, but I will start with that one.

9 So at the moment, I don't see any basis, even if there
10 were a stipulation -- well, if there's a stipulation to
11 admissibility, of course, the parties, within extremely broad
12 limits, could stipulate into evidence anything they want, and
13 unless it's a waste of time or incredibly confusing or
14 something like that, I'll allow it. So if they want to
15 stipulate to the admissibility of that document or to the
16 admissibility of that question and answer, they're free to, but
17 if they prefer not to, at the moment I have heard nothing that
18 would suggest that I should allow in the question and answer,
19 let alone the document.

20 MS. MAINIGI: OK. Thank you, your Honor.

21 THE COURT: Anything else?

22 MR. ARMAND: Another housekeeping issue, your Honor.
23 There are thousands of documents in this case, and we really
24 don't want to bore the jury to tears, and so to the extent --

25 THE COURT: You want to bore them, but just not to

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1 tears.

2 MR. ARMAND: That's right. But to the extent the
3 parties can resolve objections, I want to clarify whether we
4 can publish documents to the jury without using them with a
5 live witness, if the parties have so stipulated.

6 THE COURT: So here's the extent that documents can
7 come in by stipulating without any witness. That, of course,
8 is fine with me, but I think it makes sense to offer them at a
9 time when you can at least -- when at least it will make sense
10 to the jury what they are. I'm not requiring that, but what
11 good is it to say to the jury, as I have sometimes seen, by
12 stipulation Exhibits 10, 29, 45, 37, 243 AAA, GGG and ZZZ are
13 received. That means nothing to them. Zilch.

14 So if you want to, by stipulation, put in document X,
15 which you then want to publish to the jury, that's fine. If
16 you are going to put in a document which is there for some sort
17 of mundane purpose that has nothing really to do with the jury,
18 I suppose that's fine, too. If both of you want to agree to
19 put in hundreds of documents by stipulation that will never be
20 referred to anything but numbers, I won't say no, but I think
21 that surely will bore the jury to tears and maybe the Court to
22 anger.

23 So that's my views on that.

24 MR. ARMAND: Understood, your Honor.

25 THE COURT: Very good. OK.

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1 MS. SCHOENBERGER: Your Honor, procedurally with
2 respect to Boland transcript, there's no suggestion that the
3 designations that the government put in include counter
4 designations from the defendant that was circulated last night
5 soliciting --

6 THE COURT: I'm not going to get to that, I'm going to
7 work tonight on Mr. Price. My plans for tonight are I have to
8 teach at Columbia until 8:30, then as always on Monday, I have
9 to take my wife dancing. But at midnight it will be my
10 pleasure to turn to Mr. Price's deposition, and I will get you
11 those rulings first thing in the morning. And I'm not going to
12 look at Mr. Boland. So why don't you prepare a new copy with
13 the cross designations and cross objections and the whole
14 megillah.

15 MS. SCHOENBERGER: On the issue of getting the video
16 editing process moving forward, in the event Mr. Boland does
17 not appear live, is there a time that the Court would want to
18 receive all the designations and counter designations?

19 THE COURT: If you give it to me in the morning I will
20 try to work on it during the day, because I'm already bored by
21 the testimony, so this will give me something to do. But as
22 soon as you give it to me I will try to turn to it.

23 MS. SCHOENBERGER: Thank you, your Honor.

24 THE COURT: Very good. Thanks a lot.

25 (Adjourned to September 25, 2013 at 9:45 a.m.)

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